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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SEWERAGE AND WATER BOARD
OF NEW ORLEANS

PETITIONER

V.

GAYLE T. BENNETT, WILLIAM T. BENNET,
DONNA S. CUMMINGS, KENNETH GORDON,
DIANE GORDON, MAURICE DE LA HOUSSAYE,
ET AL

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KEVIN R. TULLY
Counsel of Record
CHARLES M. LANIER, JR.
CHRISTOVICH & KEARNEY LLP
601 Poydras Street, Suite 2300
New Orleans, LA 70130-6078
Telephone: (504) 561-5700
Facsimile: (504) 561-5743
Attorneys for the Sewerage and
Water Board of New Orleans

QUESTION PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in denying the Sewerage and Water Board of New Orleans's appeal pursuant to 28 U.S.C. § 1453(c)(4) as a result of a clerical error setting the briefing schedule to extend beyond the 60 day period for decision, when that denial conflicts with Congressional intent and deprives the Sewerage and Water Board of New Orleans of due process?
2. Whether the court has jurisdiction over this matter under the Class Action Fairness Act of 2005 (CAFA)?
3. Whether the *Bennett* and *de la Houssaye* plaintiffs and Jefferson Parish satisfied their burden to prove the elements of the Home State exception to CAFA jurisdiction, 28 U.S.C. § 1332(d)(4)(B), when they offered no proof, by affidavit or otherwise, of the citizenship of the proposed plaintiffs class and instead relied upon their subjective "common sense"?
4. Whether American Alternative Insurance Corporation is a primary defendant for purposes of the Home State exception to CAFA jurisdiction?

LIST OF ALL PARTIES

The Sewerage and Water Board of New Orleans presents the following list of all known parties in this case in accord with Supreme Court Rule 14(b):

1. Gaye T. Bennett
2. William T. Bennett
3. Donna Cummings
4. Kenneth Gordon
5. Diane Gordon
6. Maurice de la Houssaye
7. Parish of Jefferson
8. Aaron Broussard
9. Sewerage & Water Board of New Orleans
10. Board of Commissioners for the East Jefferson Levee District
11. Drainage Department of the Public Works Department of Jefferson Parish
12. Board of Commissioners for the Orleans Levee District
13. The City of New Orleans
14. The Louisiana Department of Transportation and Development
15. Board of Commissioners for the Port of Orleans
16. American Alternative Insurance Corporation

CORPORATE DISCLOSURE STATEMENT

The Sewerage and Water Board of New Orleans presents the following corporate disclosure statement in accord with Supreme Court Rule 29.614(b):

The Sewerage and Water Board of New Orleans is a public entity with limited delegation of authority, specifically to construct, control, maintain and operate the public water system, the public sewerage system and the public drainage system of the City of New Orleans. LSA—R.S. 33:4071. The Sewerage and Water Board of New Orleans has no corporate parent and no publicly-held or privately-held shares of stock.

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STATEMENT OF JURISDICTION

This Court has jurisdiction to consider the Sewerage and Water Board of New Orleans's petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1), 28 U.S.C. § 1651 and under 28 U.S.C. § 2101(c) and Supreme Court Rule 13(1), because this writ is being filed within ninety days after the United States Court of Appeals for the Fifth Circuit on May 13, 2008, denied the Sewerage and Water Board of New Orleans's Petition for Panel Rehearing, Supreme Court Rule 13(2), which affirmed the Court's panel decision on April 8, 2008, denying the Sewerage and Water Board of New Orleans's interlocutory appeal pursuant to 28 U.S.C. § 1453(c).

STATUTES INVOLVED IN THIS WRIT OF CERTIORARI

This writ of certiorari involves parts of The Class Action Fairness Act, 28 U.S.C. § 1332(d) and 28 U.S.C. § 1453:

> § 1332. Diversity of citizenship; amount in controversy; costs
>
> * * *
>
> (d)(1) In this subsection –
>
> (A) the term "class" means all of the class members in a class action;
>
> (B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;
>
> (C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and
>
> (D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.
>
> (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of

interest and costs, and is a class action in which –

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of –

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)-

(A)(i) over a class action in which

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant –

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which--

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim –

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which –

> (I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;
>
> (II) the claims are joined upon motion of a defendant;
>
> (III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or
>
> (IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply –

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

Class Action Fairness Act, 28 U.S.C. § 1332(d).
§ 1453. Removal of class actions

(a) Definitions. – In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

(b) In general.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) Review of remand orders.–

(1) In general.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

(2) Time period for judgment.—If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) Extension of time period.—The court of appeals may grant an extension of the 60-day period described in paragraph (2) if--

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal.—If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2),

including any extension under paragraph (3), the appeal shall be denied.

(d) Exception.—This section shall not apply to any class action that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 77p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

Class Action Fairness Act, 28 U.S.C. § 1453.

STATEMENT OF THE CASE

This petition concerns two of the numerous putative class actions filed in the aftermath of Hurricane Katrina seeking damages resulting from the flooding of the greater New Orleans area. Originally filed in Louisiana state court in Jefferson Parish, the *Bennett* and *de la Houssaye* suits were consolidated through a Master Consolidated Class Action Petition and seek damages from the State of Louisiana, through the Department of Transportation and Development, the Board of Commissioners for the Orleans Levee District, the Board of Commissioners for the East Jefferson Levee District, the Board of Commissioners for the Port of New Orleans, the City of New Orleans, and the Sewerage and Water Board of New Orleans. Additional defendants include the Parish of Jefferson, the Drainage Department of the Public Works Department of Jefferson Parish, the President of Jefferson Parish Aaron Broussard and, pursuant to the Louisiana Direct Action statute, LSA—R.S. 22:655, their insurer American Alternative Insurance Corporation ("AAIC").

Conspicuously omitted from the list of defendants, presumably in an attempt to avoid federal jurisdiction, is the United States of America and United States Army Corps of Engineers. Although not made a party, plaintiffs pled the concurrent negligent acts or omissions of the U.S. Army Corps of Engineers and the defendants' assumption of that fault either through the acceptance from the Corps of the public works that failed or through Acts of Assurances entered into with the United States of America in connection with the construction of those public works. Plaintiffs claim to be third party beneficiaries of the provisions of those contracts. (*See* ¶¶ 7, 8, 45, 47, 52 and 56 of the Master Consolidated Class Action Petition).

The Sewerage and Water Board of New Orleans timely removed the *Bennett* and *de la Houssaye* cases to the United States District Court for the Eastern District of Louisiana under the Class Action Fairness Act, 28 U.S.C. § 1332(d). The cases were consolidated and allotted to Judge Stanwood R. Duval, Jr., who is presiding over the massive related Katrina litigation in that court. *See In re Katrina Canal Breaches Consolidated Litigation*, No. 05-4182 in United States District Court for the Eastern District of Louisiana.

Plaintiffs and defendant Jefferson Parish moved to remand. They advanced three arguments in support of remand: (1) removal was untimely; (2) the "state action" exclusion, 28 U.S.C. § 1332(d)(5)(A), prevented removal; and (3) one or more of the "discretionary" or "mandatory" exceptions applied. The Sewerage and Water Board of New Orleans opposed remand.

The district court held oral argument after which the parties briefed the issues further as the court directed.

On August 31, 2007, the district court remanded both cases. *See Bennett, et al v. Board of Commissioners for East Jefferson Levee District, et al.*, 2007 WL 2571942 (E.D.La. Aug. 31, 2007). Holding the Sewerage and Water Board of New Orleans had timely removed the case, Bennett, 2007 WL 2571942, * 1-2, the district court nevertheless concluded the "Home State" exception, 28 U.S.C. §1332(d)(4), applied. To reach this conclusion, the district court drew an "inference" through "common sense" that more than two-thirds of the plaintiffs of the proposed class are citizens of Louisiana. Bennett, 2007 WL 2571942, *3-5. Additionally, the district court found American Alternative Insurance Corporation was not a primary defendant. Bennett, 2007 WL 2571942, *6.

The Sewerage and Water Board of New Orleans timely filed a Petition for Leave to Appeal pursuant to 28 U.S.C. § 1453(c). The Sewerage and Water Board of New Orleans argued that the district court erred or ignored the Fifth Circuit's controlling precedent by resorting, in the absence of any evidence, to "common sense" to determine the citizenship of the putative class and erred in its determination of the meaning of the term "primary defendant" as used in CAFA.

The *Bennett* and *de la Houssaye* plaintiffs opposed the Sewerage and Water Board of New Orleans's Petition for Leave to Appeal.

On October 26, 2007, the Fifth Circuit granted the Sewerage and Water Board of New Orleans's Petition for Leave to Appeal Pursuant to 28 U.S.C. 1453(c) and transferred the case to its regular calendar. On November 5, 2007, as required by Local Rule 46.3, counsel for the Sewerage and Water Board of New Orleans filed a Form for Appearance of Counsel with the Fifth Circuit and, where asked, advised the Court that the case qualified for calendaring priority under Local Rule 47.7, specifically citing 28 U.S.C. §1453(c)(2).

On November 8, 2007, the Fifth Circuit issued a briefing schedule which ordered the Sewerage and Water Board of New Orleans to submit its brief on December 18, 2007. The Sewerage and Water Board of New Orleans timely complied. Then, after sixty days from the docketing of the appeal had passed – but within the Court's briefing deadline – appellees filed their briefs: Jefferson Parish on January 16, 2008; and the *Bennett* and *de la Houssaye* plaintiffs on January 17, 2008. In their briefs, Jefferson Parish and plaintiffs did not contend the Sewerage and Water Board of New Orleans's appeal should be denied under 28 U.S.C. § 1453(c) and § 1453(d) because sixty days had passed from the docketing of the appeal. Indeed, they did not raise the issue. Instead, Jefferson Parish and the *Bennett* and *de la Houssaye* plaintiffs addressed the arguments and merits of the Sewerage and Water Board of New Orleans's appeal.

Thereafter, in a telephone call to counsel, the Fifth Circuit raised the timing issue and the denial of appeal provision of 28 U.S.C. § 1453(c)(4) and instructed the parties to address those provisions in a letter to the court. The Sewerage and Water Board of New Orleans responded on April 7, 2008. In its letter, it argued denial of its appeal was not required or warranted because: first, the parties had tacitly agreed to extend the time for this Court to decide the Sewerage and Water Board of New Orleans's appeal; and second, the Court should interpret the statute to make sense in light of Congress' purpose in enacting CAFA and providing for appellate review of remand orders. The *Bennett* and *de la Houssaye* plaintiffs responded by filing a motion to dismiss.

By order filed on April 8, 2008, the Fifth Circuit denied the Sewerage and Water Board of New Orleans's appeal pursuant to 28 U.S.C. § 1453(c). The Panel advised, "We do not reach, and express no opinion on, the merits of the appeal."

The Sewerage and Water Board of New Orleans filed a Petition for Panel Rehearing in accordance with Federal Rule of Appellate Procedure 40. On May 13, 2008, the Court of Appeals denied the petition for rehearing. This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS SO DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE COURT'S SUPERVISORY POWER

The Court of Appeals mis-docketed the Sewerage and Water Board of New Orleans's appeal so that briefing was not complete until after expiration of the time for decision on appeal under 28 U.S.C. §1453(c)(4). In its Petition for Leave to Appeal Pursuant to 28 U.S.C. 1453(c), the Sewerage and Water Board of New Orleans advised the court its petition was made pursuant to 28 U.S.C. §1453(c). The title of the pleading said as much. After the Court of Appeals granted the petition for leave to appeal, the Sewerage and Water Board of New Orleans advised the Court of Appeals the case qualified for calendaring priority under 5th Cir. R. 47.7 because the appeal was made pursuant to 28 U.S.C. § 1453(c)(2). *See* Form for Appearance of Counsel of the Sewerage and Water Board of New Orleans filed on November 5, 2007. Nonetheless, on November 8, 2007, the clerk's office calendared the briefing deadlines so that briefing would not be complete until after the expiration of the 60 day period within which the Court had to decide the appeal.

This clerical error, and the Court of Appeals' evident belief that it had no ability to correct that mistake, denied Petitioner due process and kept the Court of Appeals from reviewing and correcting an erroneous decision by the district court.

The docketing error in the Clerk's office denied the Sewerage and Water Board of New Orleans opportunity to be heard in the forum Congress provided. When the Sewerage and Water Board of New Orleans petitioned for leave to appeal the remand order, the Court of Appeals had discretion to deny outright the petition for leave to appeal. The Fifth Circuit decided otherwise, granting leave to appeal and requesting further briefing. It is therefore reasonable to conclude the Fifth Circuit believed the arguments the Sewerage and Water Board of New Orleans advanced had merit and deserved a substantive review. The appeal, however, did not receive that review. The Court of Appeals did not reach the merits.

The Court's briefing schedule was set so that briefs would not be complete until after the time delay found in 28 U.S.C. § 1453(c) had run. In effect, the appeal was docketed for denial. This certainly cannot be a result Congress intended when it: (1) provided an appeal mechanism for CAFA remands; and (2) instructed the Courts of Appeals to develop rapidly case law to construe the Class Action Fairness Act.

As the legislative history shows, Congress provided for appellate review of remand orders in CAFA litigation to permit the Courts of Appeals to develop a body of appellate law interpreting the legislation. The Senate Committee noted:

> . . . the current prohibition on remand order review was added to section 1447 after the federal diversity jurisdictional statutes and the related removal statutes had been subject to appellate review for many years and were the subject of considerable appellate level interpretive law. The Committee believes it is important to create a similar body of

> clear and consistent guidance for district courts that will be interpreting this legislation and would particularly encourage appellate courts to review cases that raise jurisdictional issues likely to arise in future cases.

See Senate Report, S.REP. 109-14, at 39 (2005), 2005 U.S.C.C.A.N. 3, 2005 WL 627977. Congress certainly did not intend that its expressed intent to develop a body of appellate decisions interpreting CAFA be thwarted by a Court's clerical oversight. Such a result is fundamentally unfair.

Indeed, the briefing schedule here varied from the practice of the Fifth Circuit's clerk's office in other CAFA appeals under 28 U.S.C. § 1453(c). The docket sheets of other decisions of the Fifth Circuit in *Frazier v. Pioneer Americas, LLC*, No. 06-30434, *Preston v. Tenet Healthsystem*, No. 07-30132, and *Weems v. Touro* Infirmary, No. 07-30160, show the Clerk's office immediately issued expedited briefing notices the same day the Court granted permissive appeals under the 28 U.S.C. §1453(c). *See also* docket in *Evans v. Walter Industries*, No. 06-11974 of the United States Court of Appeals for the Eleventh Circuit.

In those cases, the clerk's office docketed the appeals so that briefing would be complete well before the sixty day period of 28 U.S.C. § 1453(c)(4) passed. Here, to the contrary, the Clerk's office did not issue the briefing schedule on the same day the Court granted the right to appeal. And, when the Clerk's office issued the briefing schedule, the schedule established a timeframe for briefing beyond sixty days from docketing of the appeal. Thus, despite the Fifth Circuit's obvious interest in the

Sewerage and Water Board of New Orleans's appeal, the clerk's office apparently inadvertently calendared the briefing schedule so the merits of the appeal would not be considered.

Appellate courts have the ability to correct errors such as clerical error where justice requires. A Court enjoys the ability to refuse to dismiss an appeal that otherwise would violate appellate time requirements when the delay derives from a clerical mistake. In *Grafton v. Meikleham*, 246 F. 737 (5th Cir. 1917), the Court confronted a situation analogous to this one. There, rules required the appeal be docketed by November 2. But, the appeal was not docketed until over three months later on February 22. Despite the language of the rule, the Fifth Circuit decided not to dismiss the appeal.

The features of *Grafton* the Court found persuasive and led it to allow the appeal are present here. First, in *Grafton,* the appellant timely filed an appeal. Second, delay of the appeal was through no fault of the appellant. Instead, the Court caused the appeal's delay by holding up completion of the record. Third, despite the untimely docketing of the appeal, the appellee participated in hearings long after the return day had expired. The actions of the appellee ratified the continued vitality of the appeal. Accordingly, under those circumstances, the *Grafton* Court held the appeal should not be dismissed despite the language of the applicable rule. *Grafton,* 246 F. at 738-739.

Here, the Sewerage and Water Board of New Orleans timely filed its petition for leave to appeal. Once leave to appeal was granted, it advised the Court of the need for docketing priority. The Court of Appeals, however, docketed the appeal without priority. In reliance upon the Court's actions, the

Sewerage and Water Board of New Orleans complied with the briefing schedule. Despite the expiration of 60 days, the appellees – Jefferson Parish and the *Bennett* and *de la Houssaye* plaintiffs – did not move to dismiss the appeal, but instead participated in the appeal by filing briefs on the merits thereby giving tacit or implied consent to provide the Court of Appeals with additional time to decide the appeal. *See, e.g., Railroad Management Company, LLC. v. CFS Louisiana Midstream Co.*, 428 F.3d 214 (5th Cir. 2005); *Vignette Publications, Inc. v. Harborview Enterprises, Inc.*, 2000-1711 (La.App. 4 Cir. 9/12/01); 799 So.2d 531; *McDermott, Inc. (Harvey Supply Div.) v. M-Elec. & Const. Co., Inc.*, 496 So.2d 1105 (La.App.4 Cir. 1986). *Baltimore & Ohio R. Co. v. United States*, 261 U.S. 592, 597, 43 S.Ct. 425, 426-427 (1923)(An agreement implied in fact is "founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding.") *Also see Hercules, Inc. v. United States*, 516 U.S. 417, 424, 116 S.Ct. 981, 986 (1996).

Like *Grafton*, the Sewerage and Water Board of New Orleans's appeal should not have been dismissed and should have been decided on the merits.

Although the wording of 28 U.S.C. § 1453(c)(4) appears straight-forward, that does not mean its language necessarily must be enforced without reference to the intent of Congress and the purpose of the act. Courts interpreting CAFA previously have ignored clear straight-forward language of another part of the Act to conform to Congress's purpose.

In *Amalgamated Transit Union Local 1309, AFL-CIO, et al v. Laidlaw Transit Service, Inc.*, 435 F.3d

1140 (9th Cir. 2006), the Court faced the question of how to calculate the deadline for filing a petition for permission to take an appeal under 28 U.S.C. § 1453(c)(1). The facts of *Amalgamated Transit* are these: on April 12, 2005, Amalgamated Transit Union Local 1309 and others filed suit in the San Diego County Superior Court against their past and current employers, Laidlaw Transit Services, Inc., and First Transit, Inc., alleging violations of California's meal and rest period laws. The suit was purportedly filed by the Union as a "representative action," pursuant to *Professional Fire Fighters v. City of Los Angeles*, 60 Cal.2d 276, 32 Cal.Rptr. 830, 384 P.2d 158 (1963), on behalf of other employees in addition to the 15 named plaintiffs. On June 9, 2005, defendants removed the action to the United States District Court for the Southern District of California pursuant to 28 U.S.C. § 1446, alleging traditional diversity jurisdiction, federal question jurisdiction, and "class action" or "mass action" diversity jurisdiction under the Class Action Fairness Act of 2005.

Plaintiffs moved to remand, contending no valid basis for federal jurisdiction existed. On October 4, 2005, the district court denied the remand motion, finding that, although traditional diversity, federal question, and "mass action" diversity jurisdiction were lacking, diversity jurisdiction as a "class action" under § 1332(d)(1)(B) and (2)(A) existed. The order was entered on the district court's docket on October 5, 2005. On October 11, 2005, plaintiffs filed in the district court a two-page notice of appeal from the district court's order, citing 28 U.S.C. § 1453(c)(1), the provision of CAFA allowing appeals from orders granting or denying motions to remand.

On November 9, 2005, First Transit filed a motion to dismiss the appeal, contending that an appeal under § 1453(c)(1) is a discretionary appeal, that Rule 5 of the Federal Rules of Appellate Procedure therefore applies, and that plaintiffs' failure to comply with the rule deprived the court of jurisdiction. Plaintiffs opposed the motion to dismiss and filed a petition for permission to appeal pursuant to Fed.R.App.P. 5 on November 17, 2005.

After dealing with the question of whether Fed.R.App.P. 5 applied, the Court examined the express language of 28 U.S.C. § 1453(c)(1) to decide if plaintiffs' appeal notice was timely. Section 1453(c)(1) reads:

> Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals *not less than 7 days after entry of the order.*

28 U.S.C. § 1453(c)(1). (Emphasis added.)

The Court noted the use of the term "less" in the provision, but said:

> If one quickly glances at the statute, one might think that, like most other filing deadlines Congress creates, the petition must be filed within a week of the district court's order. Upon closer reading, however, we discover that the statute actually provides that the application must be 'made to the court of appeals not *less* than 7 days after entry of the order.'

> 28 U.S.C. § 1453(c)(1) (emphasis added). In other words, as we noted in *Bush*, 425 F.3d at 685, the statute as written creates a waiting period of seven days before which an appeal is *too early*, with no upper limit to when an appeal ultimately may be filed.

Id., 1145. (Emphasis original).

The Ninth Circuit noted the Tenth Circuit had examined the issue in *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 fn, 2 (10th Cir. 2005). Citing this Court's decision in *United States v. Ron Pair Enters.*, 489 U.S. 235, 242, 109 S.Ct. 1026 (1989), the Court concluded the statute contained a typographical error and the word "less" should be read as "more" to avoid "a result demonstrably at odds with the intentions of its drafters."

The Ninth Circuit considered what to do about the unusual wording of the otherwise clearly-worded provision. The Court noted that "when reviewing the language of a statute, our purpose is always to discern the intent of Congress." *Amalgamated Transit*, 435 F.3d at 1145. And although the plain language of a statute "is usually the best indication of the drafters' intent," the Court need not stop at that point. *Id.* Even where – as was the case before it – the "plain language appears to settle the question," the Court "may nonetheless look to the legislative history to determine whether there is clearly expressed legislative intention contrary to that language that overcomes the strong presumption that Congress has expressed its intent in the language it chose." *Id.*, 1146, *citing INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n. 12, 107 S.Ct. 1207 (1987). With that framework, the Ninth Circuit wrote:

> We see no logical purpose attained by requiring a party to wait seven days before seeking to appeal an order granting or denying a motion to remand, and then allowing that party to seek appellate review at any time in the future after the period has passed. That result is entirely illogical. Not surprisingly, the legislative history shows that the statute was intended to create a time limit for appeal, specifically to require that the party seeking to appeal do so not more than seven days after the district court's order. *See* S. Rep. 109-14, at 49 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 46 ("New subsection 1453(c) . . . also imposes time limits. Specifically, parties must file a notice of appeal within seven days after entry of a remand order.")
>
> We remain somewhat troubled that, in contrast to most statutory construction cases where we are usually asked to construe the meaning of an ambiguous phrase or word, we are here faced with the task of striking a word passed on by both Houses of Congress and approved by the President, and replacing it with a word of the exact opposite meaning. We nonetheless agree with the Tenth Circuit, the only other circuit to address this issue, that there is no apparent logical reason for the choice of the word 'less' in the statute, use of the word 'less' is, in fact, illogical and contrary to the stated

> purpose of the provision, and the statute should therefore be read to require that an application to appeal under § 1453(c)(1) must be filed-in accordance with the requirements of FRAP 5-not more than 7 days after the district court's order.

Amalgamated Transit, 435 F.3d at 1146.

Here, to read 28 U.S.C. § 1453(c)(4) literally, without examining the legislative history, is unwarranted. As noted above, Congress made abundantly clear that it sought to enlarge federal jurisdiction over class action lawsuits and aimed to have the Courts of Appeals develop a body of substantive law defining the contours of CAFA. Congress certainly did not intend that a clerical mistake at the Court's Clerk's Office should deprive both the Court and the parties of the right to have the substantive merits of an appeal heard. Simply stated, no purpose is served by such a rigid application of 28 U.S.C. § 1453(c)(4).

Moreover, the Sewerage and Water Board of New Orleans brought its appeal in good faith and the Court of Appeals granted it permission to appeal. The law holds that a party who brings a claim in good faith has a due process right to litigate that claim. *Jefferson Fourteenth Associates v. Wometco De Puerto Rico, Inc.*, 695 F.2d 524 (11th Cir. 1983). The due process clause of the 5th Amendment to the United States Constitution limits the power of courts to dismiss an action without affording a party the opportunity for a hearing on the merits. *Emerick v. Fenick Industries, Inc.*, 539 F.2d 1379 (5th Cir. 1976). Here, the Sewerage and Water Board of New Orleans was deprived of a review of the merits of its appeal by a docketing error. The Court of Appeals indicated an interest in considering the merits of the appeal when it granted the Sewerage and Water Board of New Orleans leave to appeal, but did not reach an opinion on the merits of the appeal due to the effect of 28 U.S.C. § 1453.[1] This violates its constitutional right to procedural due process.

Given the enactment of CAFA, and Congress's evident belief that class actions of more than local interest should be decided in federal court, merely because the Sewerage and Water Board of New Orleans can still defend its interests in state court does not repair the loss of its due process rights. If Congress thought state courts were an equal substitute for resolving class actions covered by CAFA, Congress would not have enacted CAFA. Thus, if the Sewerage and Water Board of New Orleans's appeal has merit, but its appeal is denied because of a court clerical error, then the Court's mistake deprives the Sewerage and Water Board of New Orleans of its constitutional right to a hearing on the merits of its appeal.

In the alternative, this Court should determine that 28 U.S.C. § 1453(c)(4) is not a jurisdictional statute, but merely one setting forth a claim-processing rule such that the Fifth Circuit erred in not considering the merits of the Sewerage and Water Board of New Orleans's appeal which all sides had briefed on the merits within the Court-ordered deadlines.

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[1] It is logical to conclude the Fifth Circuit found the Sewerage and Water Board of New Orleans's underlying appeal arguments compelling because it granted the Sewerage and Water Board of New Orleans leave to appeal and requested further briefing on the legal issues presented. If there were no intent to consider the merits of the appeal, then granting leave to appeal could only have served to injure the parties to the litigation by delaying the proceedings and requiring them to incur substantial expense and tie up legal resources in researching and writing their briefs. Because that conclusion is not a reasonable one, it appears that the Court's docketing error caused the Fifth Circuit to dismiss the Sewerage and Water Board of New Orleans's appeal without considering the merits.

Whether this Court characterizes the sixty day period set forth in 28 U.S.C. § 1453(c)(4) as jurisdictional or as a claim processing rule will have a profound effect. If the time limit of § 1453(c)(4) is characterized as a claim processing rule, then the Fifth Circuit erred in believing it was bound to dismiss the Sewerage and Water Board of New Orleans's appeal. If, on the other hand, the sixty-day time period is construed as "jurisdictional," Congress has breached the separation of powers set forth in the United States Constitution by directing the federal appeal court *how* it must decide a case once the Court assumed jurisdiction. Such a result would be impermissible.

In *Kontrick v. Ryan*, 540 U.S. 443, 124 S.Ct. 906 (2004), this Court noted that the courts, including this Court, have been less than clear in distinguishing time limitations that are jurisdictional compared to those that are claims processing rules. Said this Court:

> Courts, including this Court, it is true, have been less than meticulous in this regard; they have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court. 'Jurisdiction,' the Court has aptly observed, 'is a word of many, too many, meanings.'

Id., 540 U.S. at 454, 124 S.Ct. at 915. This Court held that "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Id.* 540 U.S. at 455, 124 S.Ct. at 915. *Also see Eberhart v. United States*, 546 U.S. 12, 126 S.Ct. 403 (2005).

Kontrick held that certain federal rules of bankruptcy were not jurisdictional ones, but rather dealt with "claims processing" and such rules could be waived by a party's failure to object timely to pleadings filed outside of those time limits. *Eberhart* similarly dealt with the government's forfeiture of its claim that the defendant untimely filed his motion for new trial when the government failed to assert the untimeliness issue until the district court had reached the merits. In both cases, the rules in question were viewed through the prism of determining whether a rule actually delineated the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) that fell within the Court's power to adjudicate. Rules falling outside of those boundaries properly are denominated as "claim processing rules" and are not jurisdictional. *See also Scarborough v. Principi*, 541 U.S. 401, 124 S.Ct. 1856 (2004) (holding that the thirty-day deadline for attorney fee applications and its content-specifications under the Equal Access to Justice Act, 28 U.S.C. § 2412, are not properly typed as jurisdictional.)

Here, the sixty day time limit of 28 U.S.C. § 1453(c)(4) does not describe what "classes of cases" – subject matter or persons – the Court of Appeals is competent to adjudicate, *Kontrick*, 540 U.S. at 454, 124 S.Ct. at 915; *Scarborough*, 541 U.S. at 414, 124 S.Ct. at 1865. Instead, § 1453(c)(4) is better seen as a rule setting forth time periods for handling the claim (the appeal) and, as such, the time limitation is not jurisdictional.

To interpret 28 U.S.C. § 1453(c)(4) as a jurisdictional provision would raise a constitutional separation of powers concern. Congress decides "within constitutional bounds, whether federal courts can hear cases at all" and can "also determine when, and under what conditions federal courts can hear them," *Bowles v. Russell*, ___ U.S. ___, 127 S.Ct. 2360, 2361, *citing United States v. Curry*, 6 How. 106, 113, 12 L.Ed. 363. But to read § 1453(c)(4) as jurisdictional would concede that Congress has the authority to tell the Court *how* it *must* decide a case if the Court does not rule on the merits on a filed appeal within a set time limit.[2] Such an interpretation implicates issues of constitutional separation of powers. A better result would be achieved by holding that 28 U.S.C. § 1453(c)(4) is a claims processing rule.

In sum, 28 U.S.C. § 1453(c)(4) does not describe what type of cases the Courts of Appeals are competent to adjudicate. Instead, it sets forth a period of time to process a claim and thus the provision is not jurisdictional. Because the appellees briefed the merits of the Sewerage and Water Board of New Orleans's appeal after the sixty days had run and only raised the issue after the Court of Appeals raised it *sua sponte*, the appellees waived the time period as did the litigants in *Kontrick* and *Eberhart*, and the Fifth Circuit erred in believing it was required to dismiss the Sewerage and Water Board of New Orleans's timely-taken appeal.

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[2] The situation presented in this petition differs from the one this Court addressed in *Bowles v. Russell*, ___ U.S. ___, 127 S.Ct. 2360 (2007). In *Bowles*, the habeas petition had not timely filed his notice of appeal. Here, to the contrary, the Sewerage and Water Board of New Orleans timely filed its Petition for Leave to Appeal, the Court granted it, and the Court then established the time frame by which the parties were to brief the issues on the merits on appeal. Although the briefing schedule extended beyond the sixty day window provided by § 1453(c)(4), the appellees never argued the appeal was required to be dismissed until *after* the Court of Appeals *sua sponte* raised the issue with the parties.

II. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE BURDEN OF PROOF OF AN EXCEPTION TO CAFA JURISDICTION AND TO CLARIFY THE MEANING AND PROPER APPLICATION OF 28 U.S.C. § 1332(D)(4)(B)

The rulings sought to be reviewed pertain to an important issue of federal law, arising under The Class Action Fairness Act that has not been, but should be settled by this Court.

A. The Issues Are Recurring and Important.

Federal jurisdiction for the underlying suit is claimed under CAFA. Congress enacted CAFA to expand federal jurisdiction over class actions of more than local interest. In passing CAFA, Congress provided for appeal of remand orders. Congress wanted the courts to fashion rapidly a body of law interpreting the statute and exploring the jurisdictional limits of the Act. The Courts have begun to review and interpret CAFA, but this Court has yet to interpret the Act, including § 1453(c)(4).

The substantive issues raised here offer the Court an opportunity to decide questions the lower courts frequently face, but which remain uncertain. Such issues include appropriate proof required for establishing citizenship of a putative class under the several exceptions to CAFA jurisdiction and which party bears the burden of proof. In addition, several courts have sought to determine the meaning of "primary defendant" but have found the language of the statute unhelpful to reach a firm consensus on Congress's intent. Those issues reoccur and are important and this Court is here presented with an opportunity to answer them.

On appeal, the Court of Appeals did not decide the merits of the lower court's decision, although the issues were fully briefed by all sides and were squarely positioned for a decision. And, as noted previously, Congress provided appellate review of CAFA remand orders to develop a body of appellate law interpreting the legislation. Congress intended to "particularly encourage appellate courts to review cases that raise jurisdictional issues likely to arise in the future." *See* S.REP. 109-14, at 39-40 (2005), 2005 U.S.C.C.A.N. 3, 2005 WL 627977. This Court has not spoken on CAFA jurisdiction and the exceptions to its jurisdiction and, therefore, this Court should grant this Petition for Writ of Certiorari to settle the issues presented and to comport with Congress's desire that a body of appellate law rapidly be developed.

Determining the parameters of CAFA jurisdiction is important. Here, the underlying class action litigation arising out of Hurricane Katrina is of national import and is exactly the type of suit CAFA sought to bring into the federal courts. It involves a casualty that has taxed the resources of the nation and called into question the competency of the United States Army Corps of Engineers. Plaintiffs allege the negligence of the Corps and claim that defendants are responsible for that fault. They further make claims that call for interpretation of federal contracts, so-called Acts of Assurance entered into between the United States of America and local governmental entities. Without the federal government present, plaintiffs' suit will require the court to decide relative duties between the United States and other parties and to decide rights of indemnity the United States may hold against those parties. The litigation, as pled by plaintiffs themselves, is not a local matter. Review of the jurisdictional issues is important.

B. The Decision Below is Wrong.

The district court, ignoring binding precedent of the Fifth Circuit, found an exception to CAFA jurisdiction existed and remanded the suits to state court. That decision violates Congress's intent and puts in place a subjective, purportedly "common sense" standard for determining disputes arising under CAFA.

The district court remanded this matter based upon the Home State exception to CAFA jurisdiction. 28 U.S.C. § 1332(d)(4)(B). That exception provides:

> (4) A district court shall decline to exercise jurisdiction under paragraph (2)—
>
> (A)(i) over a class action in which—
>
> * * *
>
> (B) two-thirds or more of the members of all proposed plaintiffs classes in the aggregate, and the primary defendants,

> are citizens of the State in which the action was originally filed.

28 U.S.C. § 1332(d)(4)(B). To apply the exception to this case, at least two-thirds of the plaintiff class must be citizens of Louisiana *and* all of the primary defendants must be citizens of the State. The requirements are conjunctive and both elements must be shown or the "Home State" exception is inapplicable.

In *Preston v. Tenet HealthSystem Memorial Medical Center (Touro)*, 485 F.3d 793 (5th Cir. 2007), and *Preston v. Tenet HealthSystem Memorial Medical Center, Inc. (Memorial)*, 485 F.3d 804 (5th Cir. 2007), the Fifth Circuit established that once the foundation elements of CAFA jurisdiction are shown, minimal diversity and amount in controversy, plaintiffs bear the burden to prove by competent evidence the elements of any exception to CAFA jurisdiction, specifically the citizenship of the requisite number of class members so as to fall within the "Home State" exception to CAFA jurisdiction.[3]

After assigning the burden of proof, both *Preston (Memorial)* and *Preston (Touro)* considered what constitutes sufficient proof to show the citizenship of the proposed class. The courts held that resort to general statistics from the census bureau, the Road Home Program and voter turnout records "are much too broad for any court to rely on in determining the citizenship of a class member" and "lack[. . .] the specificity required for the court to determine whether two-thirds of the class members were domiciled in Louisiana at the time" this lawsuit was filed. ; *and see Preston (Memorial)*, 485 F.3d 804. Further, the Fifth Circuit said, "CAFA does not permit the courts to make citizenship determinations based on a record bare of any evidence showing class members' intent to be domiciled in Louisiana." *Preston (Touro)*, 485 F.3d at 802.

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[3] *See also Serrano v. 180 Connect, Inc.*, 478 F.3d 1018 (9th Cir. 2007)(party seeking remand bears the burden of proof to establish an exception to CAFA jurisdiction); *Hart v. FedEx Ground Package System, Inc.*, 457 F.3d 675 (7th Cir. 2006); *Evans v. Walter Industries, Inc.*, 449 F.3d 1159, 1164-65 (11th Cir. 2006).

Here, the *Bennett* and *de la Houssaye* plaintiffs offered no competent evidence, affidavit or otherwise, to establish that at least two-thirds of the broadly defined members of the class were citizens of Louisiana at the time of filing of suit.

Plaintiffs' proposed class is expansive:

> All residents, domiciliaries, business entities, property owners, and other persons and entities residing or present on August 29, 2005, inside the geographic area bounded by (1) Metairie Road to the North, (2) Mississippi River on the South, (3) 17th Street Canal to the East, and (4) North Arnoult Road to the West (also known as the "Hōey's Basin,"), who or which suffered damages, injury or loss as a result of Hurricane Katrina-related flooding on and after August 29, 2005, and/or thereafter may have suffered additional damages including but not limited to personal injury, loss of income and other and non-economic losses, mental anguish and distress, long term health risks associated with exposure to polluted flood waters, relocation

> expenses, damage to real property, and damage to personal property.

(¶15 of the Master Consolidated Class Action Petition). The proposed class contains business entities, property owners and other persons and entities present in the geographic area whose citizenship is not ascertainable from the class description.

In support of their motion to remand, rather than offering any proof of the citizenship of the proposed class, plaintiffs relied on their own say-so to prove citizenship:

> In this case, common sense suggests that at least two-thirds of the members of a class action involving damages, in part, to residential property in Louisiana, by and on behalf of the residents living in the area damaged, would be citizens of Louisiana.

See, Memorandum in Support of Motion to Remand, p. 16.

As a result, at the hearing, the district court itself noted the plaintiffs offered no evidence of citizenship of the proposed class members:

> THE COURT: Well, I do, a bunch, and I can read them off all for you. So, I think there's a big different [sic] between Orleans and Jefferson.
>
> MR. LANIER: Well, we need to –
>
> THE COURT: But the problem is stick to your better argument at least to me, and you can argue the other one to the Court of Appeal[s], *because I think*

> *it's two-thirds, but I'm not – again I have proof problems because I wasn't given any proof. . . .*

See Trans., p.40:8-16 (emphasis added).

This lack of proof of class citizenship, and the district court's reliance instead upon so-called "common sense," ignored the controlling law of the Fifth Circuit.

To support an exception to CAFA jurisdiction, plaintiffs carried the burden to prove two-thirds or more of their putative class were Louisiana citizens at the time suit was filed. 28 U.S.C. § 1332(d)(4)(B). Plaintiffs offered no proof of this fact and the district court judge substituted his common sense of the citizenship of the proposed class for the required proof of the citizenship of the class. This decision was error and promotes a standard of justice that will be inconsistently applied depending upon the subjective conclusions of the jurist to whom the case is allotted.

Similarly, the district court's determination that AAIC was not a "primary defendant" because its potential liability was vicarious and it only provided $4 million in coverage was error. "Primary defendant" is not defined in CAFA and, reading the statute alone, its meaning is uncertain. Resorting to the Congressional Record, however, the meaning of "primary defendant" becomes clear and it is evident the district court's finding is contrary to Congress's intent.

AAIC is a defendant from whom recovery is sought by not just a significant portion of, but by the entire proposed class. Due to enforcement issues, it provides perhaps the only collectable source of recovery from its insureds, Jefferson Parish, the

Drainage Department of the Public Works Department of Jefferson Parish, and Aaron Broussard, and, perhaps, from any defendant.

The district court concluded American Alternative Insurance Company was not a primary defendant because: (1) AAIC's liability was not direct, but vicarious; and (2) AAIC ostensibly had "minimal" exposure – $4 million – compared to the damages the proposed class members sought. Neither given reason, however, justified the district court's finding that AAIC is not a primary defendant.

Congress enacted CAFA to expand diversity jurisdiction so that class actions within CAFA's scope would be litigated in federal court. To avoid interfering with a state's interest in adjudicating truly local disputes, Congress included the "Home State," exception, 28 U.S.C. § 1332(d)(4)(B). However, the Act's language and CAFA's legislative history demonstrate that Congress intended the "Home State" exception be construed narrowly and resolved *in favor* of federal jurisdiction. *See Preston (Memorial)*, 485 F.3d at 810-811; S.Rep. No. 109-14, 2005 WL 627977, at 34-35; *see also Evans*, 449 F.3d at 1163-64.

CAFA does not define "primary defendants" and only a few courts have interpreted this term in connection with the "Home State" exception. Here, the district court noted that some courts have held the term to include any defendant against whom direct liability is sought, and, therefore exclude a defendant whose liability is based on vicarious liability, indemnification or contribution. But, courts that have actually decided the meaning of this term under analogous facts apply a broader understanding, in tune with Congressional intent, to include as primary defendants those defendants, such as AAIC, which would reasonably be called upon to pay if liability were found. Those courts do not exclude defendants whose liability arises from a theory of vicarious liability or indemnification. *See, e.g., In re Ingram Barge Co.*, 2007 WL 148647 at p. 2 (E.D. La., Jan. 10, 2007)(also involving Hurricane Katrina claims); *cf. Adams v. Federal Materials Co., Inc.*, 2005 WL 1862378 (W.D. Ky. July 28, 2005)(that one defendant might be liable to another under an indemnification theory did not provide a basis for treating one as a "secondary" defendant for purposes of § 1332(d)(4)(B)).

The legislative history teaches similarly:

> For the purposes of class actions that are subject to subsections 1332(d)(3) and (d)(5)(a), the Committee intends that "primary defendants" be interpreted to reach those defendants who are the real "targets" of the lawsuit – i.e., the defendants that would be expected to incur most of the loss if liability is found. *Thus, the term "primary defendants" should include any person who has substantial exposure to significant portions of the proposed class in the action, particularly any defendant that is allegedly liable to the vast majority of the members of the proposed classes (as opposed to simply a few individual class members).*

S.Rep. No. 109-14, 2005 WL 627977, at 34-35 (2005) (emphasis added).

Notably, and as the Sewerage and Water Board of New Orleans stated in its Petition for Leave to Appeal, under the narrow interpretation the district court used, the "Home State" exception would expand to devour CAFA: foreign corporations – whose employees had directly caused the complained-of damage – would never be considered "primary" defendants because the corporation's liability would "only" be vicarious.

Finally, in finding that AAIC was not a "primary defendant" the district court opined that AAIC's exposure was minimal in comparison to the amount of the damages sought. Nothing in the legislative history or this Court's precedent warranted the district court's weighing of the relative financial exposure (or worth) of a defendant against the totality of the claimed damage to determine whether AAIC is a primary defendant. Moreover, the district court made assumptions, without evidence, about the merits comparing the potential liability between one defendant and other defendants. This analysis was not only premature, but is not relevant to the determination of whether a defendant is a primary defendant. According to Congress, the distinguishing hallmark defining a "primary defendant" under the Home State exception is a defendant's potential exposure to the entire class, not its ability to pay that exposure (in this litigation, no defendant survives the district court's analysis if the test is ability to pay the damages sought by the putative class).

The district court employed an incorrect test for determining whether a party was a "primary defendant" under the Home State exception. This Court should grant the petition to correct the lower courts' decision.

CONCLUSION

Hurricane Katrina may be the greatest calamity in the history of the United States. The lawsuits that have resulted may constitute the largest damage suits ever filed in the United States.

Congress determined the development of class action litigation had reached a point of national significance, if not crisis, such that Congress enacted the Class Action Fairness Act, 28 U.S.C. § 1332(d) and § 1453, to expand federal jurisdiction to include more of the class action litigation. Congress deemed the stakes important enough for litigants and the nation to do away with the traditional notions of federal diversity jurisdiction and to alter the long-established roles of state and federal courts in all but class actions of truly local character. In Congress's view, state courts are not a substitute for federal courts in deciding most large class action cases.

The Sewerage and Water Board of New Orleans removed this litigation to federal court, raising meritorious arguments based upon the existing CAFA precedent. It would do violence to the importance Congress attaches to this type of case to permit the decision of which forum will decide it to turn not on the merits, but upon the chance docketing of the case by a clerk of court.

As the Court said in *Patterson v. Dean Morris, L.L.P.*, 444 F.3d 365 (5th Cir. 2006), the Fifth Circuit reassured litigants, "[t]he better view is to trust the integrity of the courts of appeals to recognize the Congressional directive to handle CAFA appeals expeditiously and in good faith." *Id.*, 369. Here, through surely an innocent mistake or oversight, the Court did not recognize the urgent nature of this CAFA appeal and did not give it "expeditious[. . .]"

calendaring priority. Surely, the law affords relief from this mistake and allows a Court to remedy the error by doing as the Court did in *Grafton* – accept the appeal and decide it on the merits.

Wherefore, the Sewerage and Water Board of New Orleans asks this Court to grant its Petition for Writ of Certiorari, and either remand the appeal to the Fifth Circuit for decision on the merits or retain the appeal, since all issues arising upon the record have been thoroughly vetted by the parties, and determine the issues presented.

Respectfully Submitted:

Kevin R. Tully

KEVIN R. TULLY
COUNSEL OF RECORD
CHARLES M. LANIER, JR.
CHRISTOVICH & KEARNEY LLP
Suite 2300
Pan American Life Center
601 Poydras Street
New Orleans, LA 70130-6078
Telephone: (504) 561-5700
Attorneys for the Sewerage and
Water Board of New Orleans

APPENDIX

The Sewerage and Water Board of New Orleans submits the following appendix in conformity with Supreme Court Rule 14(i):

1. May 13, 2008, denial of Petition for Panel Rehearing
2. April 8, 2008, denial of interlocutory appeal
3. Form for Appearance of Counsel in Fifth Circuit
4. August 31, 2007, Order and Reasons
5. Master Consolidated Class Action Petition

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-31011

GAYLE T BENNETT, individually on behalf of all similarly situated Louisiana citizens; WILLIAM T BENNETT, individually and on behalf of all similarly situated Louisiana citizens; DONNA S CUMMINGS, individually and on behalf of all

similarly situated Louisiana citizens; KENNETH GORDON, individually and on behalf of all similarly situated Louisiana citizens; DIANE GORDON, individually and on behalf of all similarly situated Louisiana citizens; MAURICE DE LA HOUSSAYE, individually and on behalf of all others similarly situated

Plaintiffs - Appellees

v.

EAST JEFFERSON LEVEE DISTRICT, Board of Commissioners; JEFFERSON PARISH PUBLIC WORKS DEPARTMENT, Drainage Department; JEFFERSON PARISH; ORLEANS LEVEE DISTRICT, Board of Commissioners; NEW ORLEANS CITY; LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT; PORT OF NEW

ORLEANS, Board of Commissioner; AARON BROUSSARD; AMERICAN ALTERNATIVE INSURANCE CORPORATION

Defendants - Appellees

v.

SEWERAGE AND WATER BOARD OF NEW ORLEANS;

Defendant – Appellant

MAURICE DE LE HOUSSAYE, Individually and on behalf of all others similarly situated

Plaintiff - Appellee

v.

JEFFERSON PARISH, AARON BROUSSARD, AMERICAN ALTERNATIVE INSURANCE CORPORATION; EAST JEFFERSON LEVEE DISTRICT, Board of Commissioners; JEFFERSON PARISH PUBLIC WORKS DEPARTMENT, Drainage Department; ORLEANS LEVEE DISTRICT, Board of Commissioner; NEW ORLEANS CITY; LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT; PORT OF NEW ORLEANS, Board of Commissioner;

Defendants - Appellees

v.

SEWERAGE AND WATER BOARD OF
NEW ORLEANS

Defendant – Appellant

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, STEWART, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s Priscilla R. Owen
United States Circuit Judge

CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41 FOR STAY OF THIS MANDATE.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 07-31011

GAYLE T BENNETT, individually on behalf of all similarly situated Louisiana citizens; WILLIAM T BENNETT, individually and on behalf of all similarly situated Louisiana citizens; DONNA S CUMMINGS, individually and on behalf of all similarly situated Louisiana citizens; KENNETH GORDON, individually and on behalf of all similarly situated Louisiana citizens; DIANE GORDON, individually and on behalf of all similarly situated Louisiana citizens; MAURICE DE LA HOUSSAYE, individually and on behalf of all others similarly situated

Plaintiffs – Appellees

v.

EAST JEFFERSON LEVEE DISTRICT, Board of Commissioners; JEFFERSON PARISH PUBLIC WORKS DEPARTMENT, Drainage Department; JEFFERSON PARISH; ORLEANS LEVEE DISTRICT, Board of Commissioners; NEW ORLEANS CITY; LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT; PORT OF NEW ORLEANS, Board of Commissioner; AARON BROUSSARD; AMERICAN ALTERNATIVE

INSURANCE CORPORATION

Defendants – Appellees

v.

SEWERAGE AND WATER BOARD OF NEW ORLEANS;

Defendant – Appellant

MAURICE DE LE HOUSSAYE, Individually and on behalf of all others similarly situated

Plaintiff – Appellee

v.

JEFFERSON PARISH, AARON BROUSSARD, AMERICAN ALTERNATIVE INSURANCE CORPORATION; EAST JEFFERSON LEVEE DISTRICT, Board of Commissioners; JEFFERSON PARISH PUBLIC WORKS DEPARTMENT, Drainage Department; ORLEANS LEVEE DISTRICT, Board of Commissioner; NEW ORLEANS CITY; LOU ISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT; PORT OF NEW ORLEANS, Board of Commissioner;

Defendants - Appellees

v.

No. 07-31011

SEWERAGE AND WATER BOARD OF NEW ORLEANS

Defendant – Appellant

Appeal from the United State District Court
for the Eastern District of Louisiana
USDC No. 2:07-CV-3131
USDC No. 2:07-CV-3130

Before HIGGINBOTHAM, STEWART, and OWEN, Circuit Judges.

PER CURIAM:[4]

This interlocutory appeal is DENIED pursuant to 28 U.S.C. § 1453(c). We do not reach, and express no opinion on, the merits of the appeal.

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[4] Pursuant to 5TH Cir R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH Cir. R. 47.5.4.

FORM FOR APPEARANCE OF COUNSEL

Only attorneys admitted to the Bar of this Court may sign this form and practice before the Court. Each attorney representing the interests of a party must complete a separate form. (COMPLETE ENTIRE FORM).

NO. 07-31011

BENNETT vs. EAST JEFFERSON LEVEE, ET AL
(Plaintiff) (Defendant)

The Clerk will enter my appearance as Counsel for:

Sewerage and Water Board of New Orleans
(Please list names of all parties represented)

who IN THIS COURT is (use mouse to select one) ☐ Petitioner(s) ☐ Respondent(s) ☐ Amicus Curiae ☒ Appellant(s) ☐ Appellee(s) ☐ Intervenor

I certify that I am a member of the Bar of the Fifth Circuit Court of Appeals, or am applying by completing an admission form..

/s Charles M. Lanier, Jr.
(Signature)

cmlanier@christovich.com
(E-Mail Address)

Charles M. Lanier, Jr.
(Type or print name)

434-35-7394
(Social Security Number)

Lead Counsel
(Title, If Any)

Louisiana Bar No. 18299
(Resident State/Bar No.)
Christovich & Kearney LLP
(Firm or Organization)
Date of Birth April 8, 1961 Sex ☒ M ☐ F
Street Address 601 Poydras Street
Suite 2300
City & State New Orleans, LA Zip 70130
Tel. w/AC (504) 561-5700
Fax w/AC (504) 561-5743

NOTE: When more than one attorney represents a single party or group of parties, counsel should designate a lead counsel to whom the court will give notification, with the understanding that the lead counsel will notify all other related counsel. If lead counsel has not signed above, lead counsel must complete his or her own form for appearance of counsel. The person to be notified in this case is:

Name of Lead Counsel (Type or Print)
Charles M. Lanier, Jr

A. Name of any Circuit Judge of the Fifth Circuit who participated in this case in the district or bankruptcy court. None

B. Inquiry of Counsel

To your knowledge:

(1) Is there any case now pending in this court, which involves the same, substantially the same, similar or related issue(s)?

Yes ☐ No ☒

(2) Is there any such case now pending in a District Court (i) within this Circuit, or

(ii) in a Federal Administrative Agency which would likely be appealed to the Fifth Circuit?

Yes ☐ No ☒

(3) Is there any case such as (I) or (2) in which judgment or order has been entered and the case is on its way to this Court by appeal, petition to enforce, review, deny?

Yes ☐ No ☒

(4) Does this case qualify for calendaring priority under 5th Cir. R. 47.7? If so, cite type of case: See 28 U.S.C.§ 1453(c)(2)

If answer to (1), or (2), or (3), is yes, please give detailed information.

Number and Style of Related Case

Name of Court or Agency

Status of Appeal (if any)

Other Status (if not appealed)

NOTE: Attach sheet to give further details.

DKT-5A(11/01)

FORM FOR APPEARANCE OF COUNSEL

Only attorneys admitted to the Bar of this Court may sign this form and practice before the Court. Each attorney representing the interests of a party must complete a separate form. (COMPLETE ENTIRE FORM).

NO. 07-31011

BENNETT vs. EAST JEFFERSON LEVEE, ET AL
(Plaintiff) (Defendant)

The Clerk will enter my appearance as Counsel for:

Sewerage and Water Board of New Orleans
(Please list names of all parties represented)

who IN THIS COURT is (use mouse to select one) ☐Petitioner(s) ☐Respondent(s) ☐Amicus Curiae ☒Appellant(s) ☐Appellee(s) ☐ Intervenor

I certify that I am a member of the Bar of the Fifth Circuit Court of Appeals, or am applying by completing an admission form..

/s KevinR. Tully
(Signature)
krtully@christovich.com
(E-Mail Address)

Kevin R. Tully
(Type or print name)
231-82-5787
(Social Security Number)

Attorney
(Title, If Any)

Louisiana Bar No. 1627
(Resident State/Bar No.)
Christovich & Kearney LLP
(Firm or Organization)
Date of Birth Nov. 21, 1955 Sex ☒ M ☐ F
Street Address 601 Poydras Street
Suite 2300
City & State New Orleans, LA Zip 70130
Tel. w/AC (504) 561-5700
Fax w/AC (504) 561-5743

NOTE: When more than one attorney represents a single party or group of parties, counsel should designate a lead counsel to whom the court will give notification, with the understanding that the lead counsel will notify all other related counsel. If lead counsel has not signed above, lead counsel must complete his or her own form for appearance of counsel. The person to be notified in this case is:

Name of Lead Counsel (Type or Print)
Charles M. Lanier, Jr.

A. Name of any Circuit Judge of the Fifth Circuit who participated in this case in the district or bankruptcy court. None

B. Inquiry of Counsel

To your knowledge:

(1) Is there any case now pending in this court, which involves the same, substantially the same, similar or related issue(s)?

Yes ☐ No ☒

(2) Is there any such case now pending in a District Court (i) within this Circuit, or (ii) in a Federal Administrative Agency which would likely be appealed to the Fifth Circuit?

Yes ☐ No ☒

(3) Is there any case such as (I) or (2) in which judgment or order has been entered and the case is on its way to this Court by appeal, petition to enforce, review, deny?

Yes ☐ No ☒

(4) Does this case qualify for calendaring priority under 5th Cir. R. 47.7? If so, cite type of case: See 28 U.S.C.§ 1453(c)(2)

If answer to (1), or (2), or (3), is yes, please give detailed information.

Number and Style of Related Case

Name of Court or Agency

Status of Appeal (if any)

Other Status (if not appealed)

NOTE: Attach sheet to give further details.

DKT-5A(11/01)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GAYLE T. BENNETT, ET AL. **VERSUS** **BOARD OF COMMISSIONERS FOR EAST JEFFERSON LEVEE DISTRICT, ET AL.**	**CIVIL ACTION** **NO: 07-3130** **c/w 07-3131** **SECTION: "K"(2)**

ORDER AND REASONS

Before the Court are the following motions: Motion to Dismiss (Rec.Doc.No. 4); Motion to Remand (Rec.Doc.No. 8); Motion to Remand (Rec.Doc.No. 18); Motion to Remand (Rec.Doc.No. 23); Motion to Remand (Rec.Doc.No.24). After reviewing the pleadings, memoranda, relevant law, and Oral Argument of the parties on August 8, 2008, the Court finds that Plaintiffs' motions to remand have merit and grants the motions for the reasons assigned herein.[5]

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[5] The following cases are also remanded pursuant to this order because they raise the same issues of law: Chicago Properties interest, L.L. C. v. Broussard et al No. 07-4126 (E.D. La. removed Aug. 15, 2007);Manard, et al v. Bankers ins. Co. et al, No. 07-4127 (E.D. La. removed Aug. 15, 2007); Cason et al v. Broussard et al., No. 07-4128 (E.D. La. removed Aug. 15, 2007); Logo et al v. Jefferson Parish et al, No. 07-4152 (E.D. La. removed Aug. 15, 2007); Levy v. Jefferson Parish et at, No. 07-4153 (E.D. La. removed Aug. 15, 2007); Kaczmarek, et al v. Broussard, et al, No. 07-4154 (E.D. La. removed Aug. 15, 2007);

I. BACKGROUND

Plaintiffs in these consolidated actions are: Maurice de la Houssaye, Donna Cummings, Diane and Kenneth Gordon, and Gaye and William Bennett. The putative class members included all residents, business entities, property owners, and other person and entities residing or present on August 29, 2005, inside the geographic are bounded by (1) Metairie Road to the North, (2) Mississippi River to the South, (3) 17 Street Canal to the East, and (4) North Arnoult Road to the West (also known as the "Hoey's Basin").

Defendants include Louisiana Department of Transportation and Development, Aaron Broussard,[6] Board of Commissioners of the East Jefferson Levee District, Drainage Department of the Public Works Department of Jefferson Parish, Sewerage and Water Board of New Orleans, Board of Commissioners of Orleans Levee District, City of New Orleans, Jefferson Parish, Board of Commissioners of the Port of New Orleans, American Alternative Insurance Company ("American Alternative") (a foreign insurer).

Plaintiffs claim that their damages were "caused by the gross negligence and reckless disregard for the safety of the residents of the Parish of Jefferson in failing to secure and/or close the Geisenheimer Flood Gate, causing flood waters from the 17 Street Canal

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Brown, et a; v Broussard et at, 07-4155 (ED. La. removed Aug. 15, 2007); Schmidt v. Jefferson Parish et at, No. 07-4156 (E.D. La. removed Aug. 15, 2007).

[6] Broussard is sued in his individual and official capacity.

to back through the Geisenheimer Flood Gate and thence through the drainage system of the flooded area, rising up through the catch basins, causing widespread flooding."[7]

Suit was filed initially on October 27, 2005 by the de la Houssaye with the Bennetts filing a nearly identical lawsuit on August 28, 2006. These actions involved the same claims and putative class members.[8] On October 26, 2006, the de la Houssaye plaintiffs amended their Petition adding Aaron Broussard and American Alternative Insurance Company as Jefferson Parish's ostensible insurer. The case was consolidated in state court for discovery purposes on December 22, 2006. On May 28, 2007, a Master Consolidated Class Action Petition ("Master Petition") regarding both the *De la Houssaye* and *Bennett* actions was filed in the Twenty-Fourth Judicial District Court for the Parish of Jefferson.[9] Service of the Master was effected on Defendant Sewerage and Water Board of New Orleans ("SWB") on May 29, 2007. On June 5, 2007, separate notices of removal were respectively filed by SWB for the *Bennett* and *De la Houssaye* actions. The Court now considers whether removal of these actions was proper under the Class Action Fairness Act ("CAFA").[10]

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[7] See Mot. Remand at 6 (Rec.Doc.No. 8).

[8] Id.

[9] Id.

[10] See 28 U.S.C. § 1453.

II. DISCUSSION

A. Timeliness of Removal under CAFA

As cited above, a class action may be removed to a federal district court in accordance with the provisions of 28 U.S.C. § 1446, "except that the 1-year limitation under section 1446(b) shall not apply" and consent of all defendants is not needed. 28 U.S.C. § 1453(b).

Section 1446 provides the following:

> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not

> required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(a) & (b)

Defendant Sewerage and Water Board ("SWB") contends that it was not added as a named Defendant in the *De la Houssaye* action until the Master Consolidated Class Action Petition was ordered and filed on May 28, 2007. Thus, SWB asserts that its removal of the *Bennett* and *De la Houssaye* actions on June 5, 2007, was timely. As basis for this position, Defendant cites a recent Fifth Circuit ruling which states that "amendments that add a defendant 'commence' the civil action as to the added party" and, therefore, "opens a new window of removal" under 1446(b). *Braud v. Transport Service Co. of Illinois*, 445 F.3d 801 (Cir. 2006).[11]

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[11] "[I]f an original complaint is not amended, removal must be determined based only on the law and facts as to removability at the time of filing or receipt of the initial pleading under § 1446(b)(l)." *Braud*, 445 F.3d at 805.

Defendant further argues that it could not remove the case prior to consolidation because American Alternative, a foreign citizen, was not added as a party in the *Bennett* action until the filing of the Master Consolidated Class Action Petition on May 28, 2007. It was at this time there existed minimal diversity such that removal under CAFA was proper.

Plaintiffs oppose removal as untimely citing *Hood v. Beacon Therapeutic*, 1997 WL 323782 (N.D. Ill. Jun. 9, 1997), which stands for the proposition that consolidation did not give grounds for removal because it was not a "new claim and Defendant had notice of the claim for over a year.[12] The primary distinction between *Hood* and the instant matter is that SWB was not a party to the *Bennett* action until consolidation of *Bennett* and *De la Houssaye* and, therefore, SWB had no opportunity to remove the *Bennett* action until consolidation. In *Hood*, Beacon was a party to both actions prior to consolidation. Thus, the Court finds that SWB timely removed the *Bennett* and *De la Houssaye* actions in accordance with 28 U.S.C. § 1453.

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[12] In Hood, the plaintiff filed a wrongful death action (No. 95 L 9646) against the Chicago Board of Education in state court. Plaintiff then amended the wrongful death action, adding other defendants, including Beacon. Subsequently, the plaintiff filed a separate civil rights action other defendants including Beacon based on the same facts giving rise to the wrongful death action.

On plaintiff's motion, the two actions were consolidated. Beacon filed a notice of removal of the consolidated action. The court held that this removal was untimely and improper stating that thirty-day period to removal was lapsed as the consolidation of the cases did not give rise to a new case.

B. Abstaining from CAFA jurisdiction

It is undisputed that the matter in controversy exceeds the sum of $5 million, exclusive of interest and costs, and meets the minimal diversity requirement. A district court, however, must abstain from the exercise of subject matter jurisdiction under CAFA in some circumstances — namely, where a defendant is sued in its home state by a class comprised primarily of plaintiffs from that state, where the case involves a purely local controversy, and where the primary defendants are state actors. 28 U.S.C. § 1332(d)(3), (4) and (5). A district court also has the discretion to abstain from the exercise of subject matter jurisdiction under CAFA. The Court finds that it must abstain from exercising CAFA jurisdiction based on the Home State Exception for the reasons assigned below.[13]

The Home State Exception provides that a court shall decline CAFA jurisdiction when:

> (B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

28 U.S.C. § 1332(d)(4). Plaintiffs suggests that the *De la Houssaye* and *Bennett* actions meet the requirements of the mandatory abstention provision of subsection (d)(4) Defendants oppose remand arguing that Plaintiffs have not made a showing that greater than two-thirds of the putative

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[13] Because the Court finds that the Home State Exception applies, the Court need not address the other abstention arguments raised by Plaintiffs.

class members are Louisiana domiciliaries. Moreover, Defendants also oppose remand based on the Home State Exception because American Alliance is not a Louisiana domiciliary and, therefore, not all of the primary defendants are citizens of the state in which the action was filed.

i. Burden of Proof - Preston I and II

The burden of showing an exception to CAFA jurisdiction is on the party moving for remand. *Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 546 (5th Cir. 2006) (citing *Evans v. Walter Industries, Inc.*, 449 F.3d 1159, 1164-65 (11th Cir, 2006)). In determining whether two- thirds of putative class members are in-state citizens, a question arises as to what proof in any do plaintiffs need to provide in order to meet there burden. The Fifth Circuit recently examined the plaintiffs' burden to show that greater than two-thirds of the putative class members were citizens of the state in which the suit was filed. *See Preston v. Tenent Healthsystem Memorial Medical Center, Inc.*, 485 F.3d 804 (5th Cir. 2007)("'*Preston I*'); *Preston v. Tenet Healthsystem Memorial Medical Center, Inc.*, 485 F.3d 793 (5th Cir. 2007)("*Preston II*").[14] The *Preston II* court wrote:

> **[T]he parties moving to remand the class action must prove that the CAFA exceptions to federal jurisdiction divest the district court of subject matter**

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[14] *Preston I* refers to the Fifth Circuit opinion that upheld Judge Fallon's remand order. *Preston II* refers to the Fifth Circuit opinion that reversed Judge Lemmon remand order.

> jurisdiction. We also held that the party moving for remand must prove the statutory citizenship requirement by a preponderance of the evidence. We reasoned that Congress explicitly enumerated and envisioned deviations from the general removal statute, and noting in CAFA's text suggests that Congress meant to impose a heightened burden of proof on parties attempting to remand a class action lawsuit to state court.

Preston, 485 F.3d at 797 (citations omitted).

Applying this standard, the *Preston I* court held that greater than two-thirds of the putative class members were in-state domiciliaries relying upon primary billing addresses provided in the medical records, emergency contact information for the deceased patients, the current addresses for some of the potential class members, eight affidavits stating an intent of returning to New Orleans, and the fact that suit occurred less than two months after the storm. *Preston I*, 485 F.3d at 816-818.[15] In *Preston II*, the court held that sufficient evidence was not offered establishing greater than two-thirds of the plaintiffs were in-state domiciliaries. Despite an offer an of the patients' primary billing addresses listed in the medical records at the time of Hurricane Katrina, the *Preston II* court held that, " [s]ince [plaintiffs] offered no evidence regarding the citizenship of the proposed class for the relevant time period, we find that the parties failed to meet the two- thirds citizenship requirement..." *Preston II*, 485 F.3d 803; *Caruso v. Allstate Ins. Co.*, 469 F.Supp.2d 364 (E.D. La. Jan. 8, 2007). Another distinction in *Preston II* was that suit was filed more than one year after the storm.

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[15] Because domicile for the purposes of CAFA abstention is determined at the time the suit is filed, the fact that suit was filed two months after the hurricane makes it more likely that the Louisiana domiciliaries who were forced to leave Louisiana had not yet determined whether or not to return. Thus, there domicile would still be Louisiana.

In *Preston I*, the Fifth Circuit specifically acknowledged that there is a common-sense presumption that can be applied to a closed-end class. *Preston I*, 485 F.3d at 819 (citing *Caruso v. Allstate Ins. Co.*, 469 F.Supp.2d 364 (E.D. La. Jan. 8,2007)). The Fifth Circuit wrote, "We agree with the notion that the damage and destruction wrought by Hurricane Katrina warrants the court's incorporation of common-sense as part of the calculus in determining the citizenship of the class members." *Id.* Furthermore the Court wrote

> In light of the vast post-Katrina diaspora and the undisputably slow revitalization in parts of New Orleans, it is unreasonable to demand precise empirical evidence of citizenship in a class action lawsuit filed less than sixty days after the hurricane and related flooding. Many Hurricane Katrina victims may intend to return home yet are still dispersed throughout Louisiana and other states for reasons beyond their control, such as not having shelter and employment in the New Orleans area.

Id. Ultimately, the *Preston I* court held that "[k]eeping in mind the measurable bounds of the proposed class, we conclude that the district court made a reasonable inference regarding the temporary dual residency of the displaced Louisiana citizens at issue in this case."

Utilizing this common sense approach, the Court finds that the class definition supports an inference that more than two-thirds of plaintiffs are citizens of Louisiana. In *Caruso,* the Honorable Judge Vance relied on the plaintiffs' complaint and found that a description of the proposed class as all Louisiana homeowners who had purchased homeowner's policies from one of six defendant insurance companies was sufficient "to establish that more than two-thirds of the proposed class are Louisiana citizens." *Caruso*, 469 F.Supp.2d at 367.[16]

Here, the class is described as follows:

> The class action is brought on behalf of all residents, domiciliaries, business entities, property owners, and other persons and entities residing or present on August 29, 2005, inside the geographic area bounded by (1) Metairie Road to the North, (2) Mississippi River to the South; (3) 17 Street Canal to the East, and (4) North Arnoult Road to the West (also known as Hoey's Basin"), who or which suffered damages, injury or loss as a

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[16] The motion to remand in Caruso was ultimately denied because the local controversy exception's requirement that no other class action asserting same factual allegations against any of the defendants has been filed within three-year period preceding suit was not satisfied.

> result of Hurricane Katerin related flooding on and after August 29, 2005, and/or thereafter may have suffered additional damages including but not limited to personal injury, loss of income and other and non-economic losses, mental anguish and distress, long term health risks associated with exposure to polluted flood waters, relocation expenses, damage to real property, and damage to personal property).[17]

Because the class members here include "residents, domiciliarics, business entities, property owners, and other persons and entities residing or present on August 29, 2005," and there was no mass exodus from Jefferson Parish following Hurricane Katrina, the Court finds that it is reasonable to infer that greater than two-thirds of the class members are Louisiana citizens.

The circumstances of this case are distinguishable from those in *Preston I & II*, where the mass exodus essentially put domicile of putative class members at issue.[18] In *Preston I*, there was proof, however

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[17] *See* Notice of Removal, State Court Petition (Rec.Doc.No. 1).

[18] Certainly, the mass exodus from Orleans Parish was the factual circumstance that drove the court's analysis in Preston I& II. Indeed, the Fifth Circuit stated:

> In the wake of Hurricane Katrina, and the compounding effects of the breached levees, nearly eighty percent of the New Orleans was engulfed in flood waters rising over twenty feet in lower-lying areas. These cataclysmic events damaged destroyed, or rendered

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> inaccessible approximately 850,000 housing units. Left with no other option, authorities vested with the responsibility of public safety forced people to evacuate New Orleans in any available mode of transportation. The underlying facts of this lawsuit and the reason for the parties contesting the citizenship issue emanate from a common origin of circumstance: the unmerciful devastation caused by Hurricane Katrina. As an inevitable result of the property damage and evacuation, a great majority of the city's population either temporarily or permanently relocated to habitable areas of Louisiana and other states. In this case, the aftermath of Hurricane Katrina and attendant flooding serves as a common precipitating factor for the mass relocation pertinent to our citizenship determination and threads together the proposed class and many other citizens. The sheer magnitude of this shared catalyst formed an adequate backdrop for the district court's extrapolation that the reasons offered by the affiants for not immediately returning home, i.e., repairing the family home, finding gainful employment, and waiting for the availability of housing units, were probably representative of many other proposed class members.

Preston 1, 485 F.3d 817.

minimal, of an intent to return to Orleans Parish,[19] which negated the defendant's offer of proof that established many of the potential class members resided outside of Louisiana after the storm. Furthermore, in *Preston I* there was no such proof of intent that would negate the fact that the mass exodus from Orleans Parish caused many to change their domicile after the storm.

Here, there was no similar mass exodus from Jefferson Parish. Plaintiffs offer election statistics[20] arguing that these documents demonstrate that there was no mass exodus from Jefferson Parish due to Hurricane Katrina. These documents indicate that prior to the hurricane 269,103 registered voters in Jefferson Parish, and after the hurricane there were 279,776 registered voters.[21]

The Court also reviewed public documents which indicated that Jefferson Parish had 452,824 residents prior to the hurricane and 435,786 residents post-hurricane compared with Orleans Parish which had 454,863 prior to the hurricane and 187,525 residents after the hurricane.[22] Based on this evidence, the

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[19] In *Preston I*, the court relied on eight affidavits filed by plaintiffs suggesting they had an intent to return to their home after the storm - e.g. "[affiant] has every intention on returning as soon as her house is repaired." The Court used these affidavits to infer that many plaintiffs had the intention to return home.

[20] 16 *See* Mot. Leave File Exs. in Support of Mot. Remand, Exhibit B & C (Rec.Doc.No. 41).

[21] *Id.*

[22] Comprehensive New Study Reveals Updated Population Numbers in Storm Affected Parishes, U.S. Census Bureau and CDC; available online at www.popest.org.

Court finds that there was no analogous mass exodus of Jefferson Parish as in Orleans Parish because of Hurricane Katrina and, therefore, it is reasonable to infer that greater than two-thirds of the putative class members are citizens of Louisiana based on a common sense reading of the definition of the class in the complaint, the evidence offered by Plaintiffs, and the Court's conclusion that no substantial diaspora from Jefferson Parish took place after Hurricane Katrina.

ii. Primary Defendant

Defendant SWB argues that because all primary defendants must be from the state in which the action was filed in order to remand under (d)(4)(B) and American Alliance is non Louisiana domiciliary primary defendant, this case cannot be remanded.[23] There is little guidance as to what constitutes a primary defendant, but Judge Vance has written the following:

> **The term "primary defendants" is not defined anywhere in CAFA. Clearly, CAFA intended there to be a substantive difference between "primary defendants" and "significant defendants" as contemplated by the two exceptions to the exercise of jurisdiction under the statute. The dictionary definition of "primary" includes "first in importance; chief; principal; main." Webster's New World**

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[23] All other Defendants here are political subdivisions of the State of Louisiana.

> College Dictionary 1140 (4th ed.1999). By contrast, the dictionary definition of "significant" includes "important." These definitions appear particularly apt in the context of CAFA, meaning that a significant defendant is of less importance than a primary defendant. Additionally, a significant defendant is obviously one who is something more than "insignificant," which is defined as "having little or no importance" or "trivial."

Caruso, 469 F.Supp.2d at 369 (citations omitted).

Moreover, another court has noted that "{s}ome courts have held that the term "primary defendant" includes any defendant against whom direct liability is sought and, therefore excludes a defendant whose liability is based on vicarious liability, indemnification, or contribution." *Robinson v. Cheetah Transp.*, 2006 WL 2233580, at *2 n. 3 (W.D. La. Nov. 14, 2006) (Brady, J.). Here, American Alliance has a maximum exposure of liability of $4,000,000, as an insurer, which is minimal in comparison to the vast amount of damages sustained by the members of the putative class. Moreover, American Alliance's liability is not direct but based on a contract of insurance with the alleged tortfeasor. For these reasons, the Court finds that American Alliance not a primary defendant.

Accordingly, because Plaintiffs have shown that greater than two-thirds of the putative class members are citizens of Louisiana and all primary Defendants are citizens of Louisiana, IT IS ORDERED that the Motion to Remand (Rec.Doc.Nos

8, 18, 23, 24) are hereby GRANTED **and this proceeding is** REMANDED. IT IS FURTHER ORDERED **that the following cases are remanded for the reasons assigned herein:** ***Chicago Properties Interest, L.L.C. v. Broussard et al,*** **No. 07-4126 (E.D. La. removed Aug. 15, 2007);** ***Manard et al. v. Bankers Ins. Co. et al,*** **No. 07-4127 (RD. La. removed Aug. 15, 2007);** ***Cason et al v. Broussard et al,*** **No. 07-4128 (RD. La. removed Aug. 15, 2007);** ***Loga et al v. Jefferson Parish et al,*** **No. 07-4152 (RD. La. removed Aug. 15, 2007);** ***Levy v. Jefferson Parish et al,*** **No. 07-4153 (E.D. La. removed Aug. 15, 2007);** ***Kaczmarek et al v. Broussard et al,*** **No. 07-4154 (RD. La. removed Aug. 15, 2007);** ***Brown et al. v Broussard et al,*** **07-4155 (E.D. La. removed Aug. 15, 2007);** ***Schmidt v. Jefferson Parish et al,*** **No. 07-4156 (E.D. La. removed Aug. 15, 2007).**

New Orleans, Louisiana, on this 31st day of August, 2007.

/s/ Stanwood R. Duval, Jr.
STANWOOD R. DUVAL,
JR., UNITED STATES
DISTRICT COURT JUDGE

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 624-894 DIVISION "I"

MAURICE DE LA HOUSSAYE, INDIVIDUALLY
AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

VS.

THE PARISH OF JEFFERSON, AARON BROUSSARD AND
AMERICAN ALTERNATIVE INSURANCE CORPORATION

C/W FOR DISCOVERY

NO. 635-594 DIVISION "H" TO "I"

GAYE T. BENNETT, ET AL.

V.

BOARD OF COMMISSIONS FOR THE
EAST JEFFERSON LEVEE DISTRICT, ET AL.

FILED:___________ ______________________

DEPUTY CLERK

MASTER CONSOLIDATED CLASS ACTION PETITION

The Petition of Maurice de la Houssaye, Kenneth

Gordon, Diane Gordon, and Donna Cummings, persons of the full age of majority and domiciled in the Parish of Jefferson, State of Louisiana, and of Gaye T. Bennett and William T. Bennett, persons of the full age of majority and residents of the State of Texas, who meet the definition of class members provided in Paragraph 1, below, with respect represent:

I. INTRODUCTION

1. This is a class action on behalf of all residents, domiciliaries, business entities, property owners, and other persons and entities residing or present on August 29, 2005, inside the geographic area bounded by (1) Metairie Road to the North, (2) Mississippi River to the South, (3) 17th Street Canal to the East, and (4) North Arnoult Road to the West (also known as the "Hoey's Basin"), who or which suffered damages, injury or loss as a result of Hurricane Katrina-related flooding on and after August 29, 2005, and/or thereafter may have suffered additional damages including but not limited to personal injury, loss of income and other and non-economic losses, mental anguish and distress, long term health risks associated with exposure to polluted flood waters, relocation expenses, damage to real property, and damage to personal property.

II. PARTIES PLAINTIFF

2. The persons who bring this action for damages, pursuant to Louisiana Code of Civil Procedure Articles 591, *et seq.*, on behalf of all similarly situated Louisiana citizens, (herein collectively referred to as "Plaintiffs"), are:

A. Maurice de la Houssaye, who is a person of the full age of majority, a resident of Jefferson Parish, and a citizen of the State of Louisiana.

B. Gaye T. Bennett and William T. Bennett, persons of the full age of majority, domiciled in Houston, Texas and citizens of the State of Texas.

C. Donna S. Cummings, who is a person of the full age of majority, a resident of Jefferson Parish, and a citizen of the State of Louisiana.

D. Diane and Kenneth Gordon, persons of the full age of majority, residents of Jefferson Parish, citizens of the State of Louisiana.

3. The number of persons who are Plaintiffs is unknown at present, but is reasonably believed to be numbered in the thousands, such that joinder of all putative class members in one proceeding would be impracticable.

III. PARTIES DEFENDANT

4. Named as Defendants are;

A. Jefferson Parish, a political subdivision of the State of Louisiana;

B. Aaron Broussard, a person of the full age of majority and domiciled in Jefferson Parish, Louisiana, both individually and in his capacity as the President of Jefferson Parish;

C. Board of Commissioners of the East Jefferson Levee District, a political subdivision of the State of Louisiana created by La. R.S. 38:291 D, *et seq.*, for the purpose of construction and maintenance of levees and drainage projects;

D. The Drainage Department of the Public Works Department of Jefferson Parish, a political subdivision of the State of Louisiana;

E. Sewerage and Water Board of New Orleans, a political subdivision of the State of Louisiana created by La. R.S. 33:4071, *et seq.*, for the purpose of constructing, controlling, maintaining, and operating the public drainage system of the City of New Orleans;

F. Board of Commissioners of the Orleans Levee District, a political subdivision of the State of Louisiana created by La. R.S. 38:307, *et seq.*, for the purpose of locating, relocating, constructing, maintaining, extending, and improving levees, embankments, sea walls, jetties, breakwaters, water-basins, and other works in relation to such projects, and to conduct all dredging operations necessary in connection therewith or incidental thereto along, over, and on the shores, bottom, and bed of Lake Pontchartrain in the Parish of Orleans;

G. The City of New Orleans, a political subdivision of the State of Louisiana;

H. The Louisiana Department of Transportation and Development, a political subdivision of the State of Louisiana created by La. R.S. 36:501, *et seq.* Its purposes include "....developing and implementing programs in all areas of transportation including hurricane flood protection *Id.* at §501 B, and establishing an Office of Public Works, Hurricane Flood Protection, and Intermodal Transportation which shall administer all matters, including engineering, relating to the programs of the state with respect to the design, construction, extension, improvement, repair, and regulation of hurricane flood protection, including but not limited to the construction and design of a hurricane flood protection system consisting of levees and associated elements to provide protection against tidal surges within the Louisiana coastal zone as defined in R.S. 49:2 14.24, and other special hurricane flood protection programs as. may be directed by the secretary *Id.* at §508.3A;

I. The Board of Commissioners of the Port of New Orleans is a political subdivision of the State of Louisiana pursuant to La. R.S. 34:1 *et seq.* which regulates commerce and traffic of the Port and Harbor of New Orleans and is legally responsible for construction, maintenance and operation of the Mississippi River Gulf Outlet; and

J. American Alternative Insurance Corporation, a foreign insurer authorized to do and doing business in the State of Louisiana.

IV. JURISDICTION

5. This Court has subject matter jurisdiction over the controversy pursuant to La. Const. Art. 5 §16 A 2 and because the damages are within the jurisdictional limits of the Court as set forth in La. C.C.P. art. 1, *et seq.*

V. VENUE

6. Venue is appropriate in this Honorable Court pursuant to Louisiana Code of Civil Procedure Article 74.

VI. THIS CAUSE IS MAINTAINABLE AS A CLASS ACTION

7. This cause is maintainable as a class action because:

A. One or more members of the class may sue as representative parties on behalf of all;

B. The class is so numerous that joinder of all members is impracticable;

C. Virtually all of the persons, things, and interests located in the area described in Paragraph 1, *supra*, to a greater or lesser degree of damage, were affected by the concurrent negligent acts or omissions of the Defendants and the U.S. Army Corps of Engineers;

D. There are questions of law and/or facts common to the class; and

E. The claims of the representative parties are typical of the claims of the putative class.

8. The questions of law and fact common to the Plaintiffs, the putative class, or to Plaintiffs and subdivisions of the putative class, include but are not limited to:

A. Whether any percentage of the negligence causing Plaintiffs' harm is attributable to the U.S. Army Corps of Engineers;

B. Whether any or all of the Defendants are comparatively at fault with the U.S. Army Corps of Engineers;

C. Whether Plaintiffs' damages were caused by the escape of water from the 17th Street Canal between U.S. Highway 61 and Northline Street in Jefferson Parish;

D. Whether Plaintiffs' damages were caused by the lack of a bilateral flood wall between U.S. Highway 61 and Northline Street on the 17th Street Canal;

E. Whether Plaintiffs' damages were caused and/or exacerbated by the continued pumping of water from Jefferson and Orleans Parishes into the 17th Street Canal after Sewerage and Water Board Pumping Station No. 6 was shut down;

F. Whether Defendants caused or contributed to the failure to close the Geisenheimer Flood Gate;

G. Whether the failure to close the Geisenheimer Flood Gate caused and/or exacerbated flooding;

H. Whether some of the water affecting Plaintiffs came from more remote sources such as the Inner Harbor Navigation Canal, or the "north" 17th Street Canal;

I. Whether the Defendants concealed information from Plaintiffs regarding the safety of the 17th Street Canal;

J. Whether the Defendants' conduct has created a long-term health risk in the proposed class area due to its inundation with polluted waters; and

K. Whether any of the Defendants assumed flood protection responsibility for the U.S. Army Corps of Engineers.

9. The claims of the named Plaintiffs are typical of the claims of the class, *which include* personal injury, property damage, property losses, evacuation expenses, mental anguish and suffering, loss of income and other economic losses, and a need for medical monitoring.

10. The named Plaintiffs will fairly and adequately protect the interests of the class because:

A. They are free of any interests which might be antagonistic to the other putative class members; and

B. They will actively participate in the litigation to ensure that the interests of the class members are protected from abuse.

11. The class may be defined objectively using readily ascertainable boundaries including specific streets, canals, and the Mississippi River.

VII. IN ADDITION, THIS CAUSE MAY BE MAINTAINED AS A CLASS ACTION

12. The prosecution of separate actions by individual class members would create the risk of:

A. Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

B. Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not party to the adjudications or substantially impair or impede their ability to protect their interests.

13. This cause is proper for certification due to the fact that Defendants have acted and/or refused to act on grounds generally applicable to the class, thereby making equitable relief, including the establishment and administration of a medical monitoring program, injunctive relief, and/or declaratory relief appropriate with respect to the class as a whole.

14. The Court will find that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy, and mailers pertinent to that finding include:

A. The interest of the class individually controlling the prosecution of separate actions;

B. The extent and nature of any litigation concerning the controversy already commenced by members of the class;

C. The desirability or undesirability of concentrating the litigation in the particular forum;

D. The difficulties likely to be encountered in the management of a class action;

E. The practical ability of individual class members to pursue their claims without class certification; and

F. The extent to which relief plausibly demanded on behalf of the class, including vindication of public policies and legal rights as may be implicated, justifies the costs and burdens of class litigation.

VIII. PROPOSED CLASS DEFINITION

15. Plaintiffs allege and propose that the class be defined as:

All residents, domiciliaries, business entities, property owners, and other persons and entities residing or present on August 29, 2005, inside the geographic area bounded by (1) Metairie Road to the North, (2) Mississippi River to the South, (3) J Street Canal to the East, and (4,) North Arnoult Road to the West (also known as the "Hoey Basin'), who or which suffered damages, injury or loss as a result of Hurricane Katrina-related flooding on and after August 29, 2005, and/or thereafter may have suffered additional damages including but not limited to personal injury, loss of income and other and non-

economic losses, mental anguish and distress, long term health risks associated with exposure to polluted flood waters, relocation expenses, damage to real property, and damage to personal property.

Or, alternatively, an appropriate definition designated by the Court.

IX. FACTS

16. The Board of Commissioners of the East Jefferson Levee District is responsible for the construction and maintenance of levees and drainage projects in Jefferson Parish.

17. The Drainage Department of the Public Works Department of Jefferson Parish has immediate responsibility for the removal of flood waters in Jefferson Parish and the proposed class area.

18. The Sewerage and Water Board of New Orleans has immediate responsibility for controlling and operating the public drainage system of the City of New Orleans.

19. The Board of Commissioners for the Orleans Levee District has the statutory responsibility to develop, construct, and maintain flood control systems and structures within the City of New Orleans, including levees, flood walls, sea walls, and flood gates, in order to protect the City of New Orleans from flooding.

20. On and before August 29, 2005, the 17th Street Canal, which is parallel and adjacent to the Jefferson Parish-Orleans Parish line, carried water northward into Lake Pontchartrain.

21. This canal is divided into two sections by the Sewerage and Water Board of New Orleans' Pumping Station No. 6. The "south" portion, which is

fed by tributary drainage canals and culverts, is located between the pumping station and the Mississippi River. The "north" portion is located between the pumping station and Lake Pontchartrain.

22. South of Pumping Station No. 6, between U.S. Highway 90 and Pumping Station No. 6, a flood wall is present on the west side of the 17th Street Canal.

23. However, this wall is discontinuous on its west side, with a 300 foot gap at its intersection with U.S. Highway 61.

24. A floodgate, known as the Geisenheimer Flood Gate, is located at the point where the drainage system of the flooded area flows into the 17th Street Canal.

25. On August 29, 2005, the greater New Orleans area was struck by Hurricane Katrina, which produced torrential rainfall of up to nine (9) inches, and also breached levees and sea walls.

26. The Sewerage and Water Board pumped flood waters from their gathering point at Pumping Station No. 1 into the Washington Avenue Canal, which along with various other drainage culverts, is a tributary of the "south" 17th Street Canal.

27. Simultaneously, additional flood waters were introduced into the "south" 17th Street Canal by the Drainage Department of Jefferson Parish.

28. Many drainage pumps failed and Sewerage and Water Board Pumping Station No. 6 eventually slowed and was taken offline.

29. Water in the "south" portion of the 17th Street Canal, which could no longer be pumped into

Lake Pontchartrain, rose over the tops of the canal where there were no flood walls and where there were gaps in the embankments.

30. Plaintiffs injuries and damages were caused by the gross negligence and reckless disregard for the safety of residents of the Parish of Jefferson in failing to secure and/or close the Geisenheimer Flood Gate, causing flood waters from the 17th Street Canal to back through the Geisenheimer Flood Gate and thence through the drainage system of the flooded area, rising up through the catch basins, causing wide spread flooding.

31. These flood waters entered an area bounded by Airline Hwy., the 17th Street Canal and Metairie Road, herein after referred to as "Old Metairie" at the intersection of the canal and U.S. Highway 61, and at the intersection of the canal and Monticello Street, where Northline Street and Orpheum Street meet. Thereafter, the homes of Plaintiffs and the other class members were flooded with a combination of water from the 17th Street Canal and water that came from other areas and was mixed with the 17th Street Canal.

32. Either the Parish of Orleans, or the Parish of Jefferson, or the City of New Orleans, or the Board of Commissioners of the Orleans Levee District, or the Board of Directors of the East Jefferson Levee District, or the Sewerage and Water Board of New Orleans, or a combination of them, owned the bottom of the 17th Street Canal.

33. Either the Parish of Orleans, or the City of New Orleans, or the Board of Directors of the Orleans Levee District, or the Sewerage and Water Board of New Orleans, or a combination of them,

owned the bottoms of the 17th Street Canal, the Orleans Avenue Canal, the London Avenue Canal, and the Inner Harbor Navigation Canal.

34. At some point the intruding waters from various points of entry in the City commingled with each other to form a saltwater sea.

X. NEGLIGENCE OF JEFFERSON PARISH

35. Plaintiffs incorporate by reference Paragraphs 16 through 34 of this Petition as if fully set forth herein.

36. Jefferson Parish was negligent in the following non particulars:

A. Failing to erect flood walls or embankments on parish property located on the east side of the "south" 17th Street Canal;

B. Failing to erect flood walls or embankments at the intersections of the "south" 17th Street Canal at U.S. Highway 90, U.S. Highway 61, and Northline Street, including 300 feet on west side of the canal north of U.S. Highway 61;

C. Failing to prevent the foreseeable incursion of flood waters into "Old Metairie" through obvious gaps and/or low points in the parish drainage system;

D. Failing to timely place barriers across Airline Highway and the Northline bridge over the 17th Street Canal, when they knew, or should have known, that the water rising in the 17th Street Canal would soon overtop these means of ingress into the parish, thereby flooding the affected areas;

E. Owning the land on the eastern side of the "south" 17th Street Canal yet failing to erect a flood wall or an embankment between Jefferson Highway and Northline Street;

F. Owning the land on both sides of the canal, but using it to the detriment of the adjoining landowners;

G. Failing to secure and/or close the Geisenheimer Flood Gate, causing flood waters from the 17th Street Canal to back through the Geisenheimer Flood Gate and thence through the drainage system of the flooded area, rising up through the catch basins, causing wide spread flooding;

H. Failing to close other culverts which drain into the 17th Street Canal, thereby permitting additional flood waters to enter the flooded area;

I. Failing to timely place barriers across Airline Highway and the Northline bridge over the 17th Street Canal, when it knew, or should have known, that the water rising in the 17th Street Canal would soon overtop these means of ingress into the parish, thereby flooding the affected areas.

J. Failing to secure/close the Geisenheimer Flood Gate, although upon information and belief, policies and procedures were in place for the closure of the Geisenheimer Flood Gate which was designed and intended to be closed, thus avoiding the precise flooding and damages which occurred.

K. Violating Jefferson Parish policy and procedures by failing to close the Geisenheimer Flood Gate when policy and procedures mandated that the Gate should be closed; and

L. Is liable for the gross negligence and willful and wanton conduct of Aaron Broussard under the doctrine of respondeat superior.

XI. LIABILITY OF AARON BROUSSARD

37. Plaintiffs incorporate by reference Paragraphs 16 through 34 of this Petition as if fully set forth herein.

38. Aaron Broussard was negligent in the following non-exclusive particulars:

A. Failing to prevent the foreseeable incursion of flood waters into "Old Metairie" through obvious gaps and/or low points in the parish drainage system;

B. Failing to timely place barriers across Airline Highway and the Northline bridge over the 17th Street Canal, when he knew, or should have known, that the water rising in the 17th Street Canal would soon overtop these means of ingress into the parish, thereby flooding the affected areas;

C. Failing to close, or causing others under his direction, supervision, and/or control to close, the Geisenheimer Flood Gate, although, upon information and belief, policies and procedures were in place for the closure of the Geisenheimer Flood Gate which was designed and intended to be closed, thus avoiding the precise flooding and damages which occurred;

D. Failing to close, or causing others under his direction, supervision, and/or control to close, other culverts which drain into the 17th Street Canal, thereby permitting additional flood waters to enter the flooded area; and

E. Violating Jefferson Parish policy and procedures by failing to close, or causing others under his direction, supervision, and/or control to close, the Geisenheimer Flood Gate when policy and procedures mandated that the Gate should be closed.

F. At all pertinent times hereto, Aaron Broussard was acting within the course and scope of his employment with Jefferson Parish, and thus, Jefferson Parish is liable for all acts, omissions, conduct, both negligent and willful and wanton, of Aaron Broussard.

XII. NEGLIGENCE OF THE EAST JEFFERSON LEVEE BOARD

40. Plaintiffs incorporate by reference Paragraphs 16 through 34 of this Petition as if fully set forth herein.

41. The Board of Commissioners for the East Jefferson Levee District was negligent in the following non-exclusive particulars:

A. Failing to timely halt the continued flow of drainage water into the "south" 17th Street Canal from its Jefferson Parish canal and culvert tributaries so as to reduce the amount of water flooding into "Old Metairie" through gaps in the canal's embankments;

B. Failing to erect flood walls or embankments at the intersections of the "south" 17th Street Canal at U.S. Highway 90, U.S. Highway 61, and Northline Street;

C. Failing to prevent the foreseeable incursion of flood waters into "Old Metairie" through obvious gaps and/or low points in the parish drainage system; and

D. Failing to erect a flood wall on the east side of the "south" 17th Street Canal which, upon information and belief, is located in Jefferson Parish.

XIII. NEGLIGENCE OF THE DRAINAGE DEPARTMENT OF JEFFERSON PARISH

42. Plaintiffs incorporate by reference Paragraphs 16 through 34 of this Petition as if fully set forth herein.

43. The Drainage Department of the Jefferson Parish Public Works Department was negligent in the following non-exclusive particulars:

A. Failing to timely halt the continued flow of drainage water into the "south' 17th Street Canal from its Jefferson Parish canal and culvert tributaries so as to reduce the amount of water flooding into "Old Metairie" through gaps in the canal's embankments;

B. Failing to prevent the foreseeable incursion of flood waters into "Old Metairie" through obvious gaps and/or low points in the parish drainage system;

C. Failing to secure and/or close the Geisenheimer Flood Gate, causing flood waters from the 17th Street Canal to back through the Geisenheimer Flood Gate and thence through the drainage system of the flooded area, rising up through the catch basins, causing wide spread flooding; and

D. Owning the land on the eastern side of the "south" 17th Street Canal (*i.e.*, Monticello Street) yet failing to erect a flood wall or an embankment between Jefferson Highway and Metairie Road.

XIV. NEGLIGENCE AND/OR FAULT OF THE SEWERAGE AND WATER BOARD

44. Plaintiffs incorporate by reference Paragraphs 16 through 34 of this Petition as if fully set forth herein.

45. The Sewerage and Water Board of New Orleans was negligent in the following non-exclusive particulars:

A. Failing to install a flood wall on the east side of the 17th Street Canal between U.S. Highway 90 and Pumping Station No. 6;

B. Failing, on August 29, 2005, to close the Geisenheimer Flood Gate [when requested to do so by the Jefferson Parish Drainage Department] which allowed a severe back flow of flood waters into “Old Metairie” from the 17th Street Canal;

C. Failing to realize that pumping waters into the “south” 17th Street Canal via the Washington Avenue Canal would immediately result in severe flooding when Pumping Station No. 6 was shut down;

D. Continuing to pump flood and rain waters from the Broad Street, Pritchard Place, and Lakeview pumping stations into the “south” 17th Street Canal after Pumping Station No. 6 was reduced in flow and then shut down, preventing water from being pumped into Lake Pontchartrain and exacerbating the severe flooding in “Old Metairie”;

E. Failing historically to measure levee heights while aware that these levees continued to subside;

F. Generally engaging in ineffective and counterproductive water pumping activities;

G. Failing, in 2004, to understand and correct seepage along the 17th Street Canal;

H. Failure to provide auxiliary power sources for extended emergency operation of Pumping Station No. 6;

I. Dredging the 17th Street Canal to a level below the sheet pile; and

J. Breaching several acts of assurances given to the United States of America through the Army Corps of Engineers enacted for the benefit of the plaintiffs.

XV. NEGLIGENCE AND/OR FAULT OF THE ORLEANS LEVEE BOARD

46. Plaintiffs incorporate by reference Paragraphs 16 through 34 of this Petition as if fully set forth herein.

47. The Board of Commissioners of the Orleans Levee District was negligent in the following non-exclusive particulars:

A. Failing to adequately inspect the east side of the "south" 17th Street Canal between U.S. Highway 90, Metairie Road, and Pumping Station No. 6;

B. Failing to discover there was no flood wall or embankment on the east side of the "south" 17th Street Canal between Jefferson highway and Metairie Road;

C. Failing to erect a flood wall or embankment on the east side of the "south" 17th Street Canal between U.S. Highway 90 and Metairie Road;

D. Failing historically to measure levee heights while aware that these levees continued to subside; and to maintain all of the levees under its jurisdiction;

E. Failing, in 2004, to understand and correct seepage along the 17th Street Canal;

F. Failing to warn the public, including Plaintiffs and class members, that severe flooding would result from the overflow of the "south" 17th Street Canal between U.S. Highway 90 and Metairie Road;

G. Dredging the 17th Street Canal to a level below the sheet pile;

H. Failing to maintain all levees under its jurisdiction; and

I. Breaching several acts of assurances given to the United States of America through the Army Corps of Engineers enacted for the benefit of the plaintiffs.

XVI. NEGLIGENCE AND/OR FAULT OF THE CITY OF NEW ORLEANS

48. Plaintiffs incorporate by reference Paragraphs 16 through 34 of this Petition as if fully set forth herein.

49. The City of New Orleans was negligent in the following non-exclusive particulars:

A. Owning portions of the property adjacent to the Jefferson Parish line but failing to protect the public, including Plaintiffs and class members, from foreseeable flooding;

B. Failing to erect flood walls or embankments on Orleans Parish Property along the "south" 17th Street Canal;

C. Failing to warn Plaintiffs and class members of the grave danger posed by continued drainage of storm and flood waters into the "south" 17th Street Canal before Pumping Station No. 6 was shut-down;

D. Through the negligence of each of the Mayors of the City of New Orleans in serving as the head of the Sewerage and Water Board since its inception, and in concurring in the negligence, actions, and inactions of the Sewerage and Water Board; and

E. Liability through ownership of defective real property causing damage to adjacent owners.

XVII. NEGLIGENCE AND/OR FAULT OF THE LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

50. Plaintiffs incorporate by reference Paragraphs 16 through 34 of this Petition as if fully set forth herein.

51. The Louisiana Department of Transportation and Development was negligent in the following non-exclusive particulars:

A. Failing to foresee the entry of flood waters from the "south" 17th Street Canal into "Old Metairie" through wide gaps in canal embankments at U.S. Highway 90, U.S. Highway 61, and Pumping Station No. 6;

B. Failing to inspect properly the "south" 17th Street Canal;

C. Failing to close the gaps in protective embankments on the "south" 17th Street Canal;

D. Failing to extend levees and embankments across critical inter-parish roadway intersections; and

E. Failing to improve the levees and embankments providing hurricane flood protection to "Old Metairie."

XVIII. LIABILITY OF THE BOARD OF COMMISSIONERS FOR THE PORT OF NEW ORLEANS

52. The Board of Commissioners of The Port of New Orleans entered into acts of assurances with the United States of America including, the years 1957, 1969 and 1974, wherein it assumed responsibility for any claim for damages due to construction, maintenance and operation of the Mississippi River Gulf Outlet project.

53. Pursuant to the controlling jurisprudence in Louisiana, the Port may not invoke the immunity provision that is personal to the Corps of Engineers (USA).

54. The Board of Commissioners of the Port of New Orleans has a real interest in the Mississippi River Gulf Outlet waterway.

55. The Port failed to maintain and assure safe operation of the project.

56. By agreement the Port is responsible for the water that flowed from the Mississippi River Gulf Outlet into the area defined in Paragraph 1 above.

XIX. LIABILITY OF AMERICAN ALTERNATIVE INSURANCE CORPORATION

57. Plaintiffs incorporate by reference Paragraphs 16 through 34 of this Petition as if fully set forth herein.

58. At all material times, the defendant, American Alternative Insurance Corporation, had in full force and effect a policy of insurance insuring defendant, the Parish of Jefferson, for the injuries and damages at issue in this lawsuit, and is liable, in solido, with Aaron Broussard and the Parish of Jefferson.

XX. DAMAGES

59. These Defendants breached duties owed to Plaintiffs and the putative class.

60. As a result of the comparative negligence, conduct, acts, omissions, and/or fault of the Defendants and the U.S. Army Corps of Engineers, Plaintiffs have been damaged.

61. Defendants are strictly liable insofar as the injuries and damages sustained by Plaintiffs and the Plaintiffs' class were caused by a defect in the flood

control systems over which Defendants exercised custody and control. Defendants are also jointly liable to Plaintiffs' class for their own gross negligence and willful and wanton conduct

62. As a result of the foregoing, Plaintiffs have sustained damages which include but are not limited to:

A. Loss of/or damage to movable property;

B. Loss of/or damage to real property;

C. Repair and replacement cost of homes and belongings;

D. The cost of substitute housing;

E. Moving expenses;

F. Diminution in house value;

G. Inconvenience;

H. Profound mental anguish and suffering;

I. Exposure of individuals and property to flood-borne toxic substances requiring future medical monitoring;

J. Economic losses including business losses, increased insurance costs, insurance deductibles, lost wages and salaries, and the expenses of emergency relocation;

K. Family separation and evacuation;

L. Physical injury;

M. Past and future medical expenses;

N. Expert and professional fees; court costs, and legal interest; and

O. All other expenses/damages as shall be proven at trial.

XXI. DEMAND FOR JURY TRIAL

63. Plaintiffs hereby demand a trial by j as to all issues triable by jury.

XXII. RELIEF REQUESTED

WHEREFORE, the representative Plaintiffs, individually and on behalf of all those similarly situated, pray that Defendants be served with a copy of the Petition and be cited to appear and answer it; that the foregoing class action petition be certified as a class action pursuant to Louisiana Code of Civil Procedure Articles 591, *et seq.*; that the suggested class representatives or other representatives designated by the Court be approved as class representatives; that the subclasses and subclass representative to be proposed in the Master Consolidated Class Action Petition be approved by the Court; that the boundaries suggested above be approved or alternative boundaries be designated by the Court; that after due proceedings had there be judgment herein in favor of Plaintiffs and against, Defendants, Jefferson Parish, Aaron Broussard, individually and in his capacity as President of Jefferson Parish, the Board of Commissioners for the East Jefferson Levee District, the Drainage Department of the Public Works Department of Jefferson Parish, the Sewerage & Water Board of New Orleans, Board of Commissioners of the Orleans Levee District, the City of New Orleans, the Louisiana Department of Transportation and Development, the Board of Commissioners for the

Port of New Orleans, and American Altemative Insurance Corporation, jointly, severally and in solido, as their respective liabilities may ultimately be determined, for any and all money damages which may be reasonable under these premises, plus legal interest thereon from date of judicial demand, for trial by jury, for all costs of these proceedings and for attorney fees as provided for in La. Code of Civil Procedure 595.

Respectfully submitted,

By: /s/ STEPHEN K. CONROY

STEPHEN K. CONROY (BAR No. 4343)

CONROY LAW FIRM, PLC

3838 N. Causeway Blvd.,

Suite 3130

Metairie, Louisiana 70002

Telephone: (504) 830-3450

Facsimile: (504) 830-4535

By: /s/ WILLIAM C. GAMBEL
WILLIAM C. GAMBEL (BAR No. 5900)
MILLING BENSON WOODWARD LLP
909 Poydras Street, Suite 2300
New Orleans, LA 70112
Telephone: (504) 569-7210
Facsimile: (504) 569-7001
PLAINTIFFS LITIGATION COMMITTEE
JOHN J. CUMMINGS, III, Bar #4652
Special Counsel
Cummings & Cummings

416 Gravier Street
New Orleans, LA 70130
Telephone: (504) 586-0000
Regel L. Bisso, Bar No. 3088
Conroy Law Firm, PLC
3838 N. Causeway Boulevard
Suite 3130
Metairie, LA 70002
Telephone: (504) 830-3450
Telecopier: (504) 830-4535
Christine W. Marks, Bar No. 23207
Conroy Law Firm, PLC
3838 N. Causeway Boulevard
Suite 3130
Metairie, LA 70002
Telephone: (504) 830-3450
Telecopier: (504) 830-4535
DEBORAH SULZER, Bar # 19806
650 Poydras Street, Suite 2635
New Orleans, LA 70130
Telephone: (504) 299-3380
RICHARD A.WEIGAND, Bar # 13324
WEIGAND & LEVENSON
427 Gravier Street
New Orleans, LA 70130
Telephone: (504) 568-1256
ARTHUR MORRELL, Bar # 1494
1660 Treasure Street
New Orleans, LA 70119
Telephone: (504) 261-0535
J.P. MORRELL, Bar #29635
1660 Treasure Street
New Orleans, LA 70119
Telephone: (504) 261-0535
JUANA LOMBARD
3520 General DeGaulle Drive, Suite 4070

New Orleans, LA 70114
Telephone: (504) 368-1911
SUZETTE BAGNERIS, Bar # 2224
3520 General DeGaulle Drive, Suite 4070
New Orleans, LA 70114
Telephone: (504) 368-1911

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he has this 29 day of May, 2007, delivered a copy of the foregoing pleading to all attorneys of record for all other parties in this action by electronic, facsimile, and/or hand delivery.

/s/ WILLIAM C. GAMBEL
WILLIAM C. GAMBEL

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